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Summary record of the 10th meeting

Held at Headquarters, New York, on Friday, 26 October 2001, at 3 p.m.

Chairman: Mr. Lelong (Haiti)

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01-60460 (E)

The meeting was called to order at 3.10 p.m.

Agenda item 173: Observer status for the Community of Sahelo-Saharan States in the General Assembly *(continued)* (A/C.6/56/L.3)

1. **The Chairman** drew attention to draft resolution A/C.6/56/L.3.

2. *Draft resolution A/C.6/56/L.3 was adopted.*

3. **Mr. Manis** (Sudan) welcomed the adoption of the draft resolution, since regional integration organizations were among the main vehicles for economic and social development in the countries of Africa. The Committee's decision would help to strengthen cooperation between the members of the Community of Sahelo-Saharan States and the United Nations and thereby assist the countries of the Community in their efforts to achieve the development objectives set by the United Nations.

Agenda item 176: Observer status for Partners in Population and Development in the General Assembly *(continued)* (A/C.6/56/L.4 and Corr.1)

4. **Mr. Gomaa** (Egypt) requested more time to continue his consultations on the draft resolution submitted under agenda item 176.

5. **Mr. Hamidullah** (Bangladesh) requested that the Committee defer its consideration of the draft resolution to a later meeting to allow him time to conclude the negotiations which he had begun with other delegations.

6. **The Chairman** said that the Committee would resume its consideration of the draft resolution at a later meeting.

Agenda item 168: Observer status for the International Institute for Democracy and Electoral Assistance in the General Assembly *(continued)* (A/C.6/56/L.5)

7. **The Chairman** drew attention to draft decision A/C.6/56/L.5.

8. *Draft decision A/C.6/56/L.5 was adopted.*

Agenda item 165: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization *(continued)* (A/C.6/56/L.6)

9. **Mr. Herasymenko** (Ukraine), introducing draft resolution A/C.6/56/L.6, entitled "Implementation of the provisions of the Charter of the United Nations related to assistance to third States affected by the application of sanctions", said that the text was to a large extent based on the text of resolution 55/157, which had been adopted the previous year, but it also took into account the relevant resolutions which the General Assembly had adopted at its fifty-fifth session, the most recent reports of the Special Committee on the Charter of the United Nations, the Administrative Committee on Coordination and the Secretary-General, and the draft recommendations of the working group of the Security Council to develop general recommendations on how to improve the effectiveness of United Nations sanctions. The only new paragraph in the preamble referred to paragraphs 56 to 61 of the road map towards the implementation of the United Nations Millennium Declaration (A/56/326), which contained the views of the Secretary-General on ways of minimizing the adverse effects of sanctions on innocent populations and third parties. The operative part also remained essentially unchanged. It should be noted, however, that, inter alia, paragraph 6 had been slightly rephrased to take into account a recommendation by the Special Committee on the Charter of the United Nations that called on the Secretary-General to expedite the preparation of his report. That report was long overdue and should be submitted to the General Assembly as soon as possible.

10. He hoped that the draft resolution, which was balanced and non-controversial, would be adopted by consensus, as had been the case in previous years.

The meeting rose at 3.40 p.m.

United Nations A/C.6/56/SR.11

General Assembly
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Summary record of the 11th meeting
Held at Headquarters, New York, on 29 October 2001, at 10 a.m.

Chairman: Mr. Lelong ..... (Haiti)

Contents

Agenda item162: Report of the International Law Commission on the work of its fifty-third session

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01-60713 (E)

The meeting was called to order at 10.10 a.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (A/56/10 and Corr.1)

1. **The Chairman** congratulated the Commission on the progress it had made on all the topics on its agenda. In particular, completion of the draft articles on State responsibility, a topic which had been on its agenda for almost 50 years, would constitute a milestone in its work and in modern international law. The Commission had also completed the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities). The exchange of views between the Committee and the Commission and, recently, the even closer cooperation between them, had given rise to a dialogue of high intellectual calibre and great interest.

2. **Mr. Kabatsi** (Chairman of the International Law Commission) introduced the report of the International Law Commission on the work of its fifty-third session (A/56/10 and Corr.1). In finalizing its second reading of the draft articles on State responsibility, the Commission had been guided by five distinguished jurists from different legal traditions who had served as special rapporteurs. The draft articles developed a clear system for regulating States' obligations in their interactions with other States and, as such, represented an important step towards a global society where respect for the rule of law was paramount.

3. At its fifty-second session, the Commission had taken the unprecedented step of submitting to the General Assembly the text of the draft articles as adopted by the Drafting Committee, thereby giving Governments a further opportunity to comment on them. At its fifty-third session, the Commission had had before it the fourth report of the Special Rapporteur, Mr. James Crawford, which contained a detailed record of comments made by Governments before the Sixth Committee and in writing, together with further written submissions by States; on the basis of those comments, the Commission had finalized its second reading of the draft.

4. The title of the draft articles had been changed to "Draft articles on the responsibility of States for internationally wrongful acts" in order to distinguish the topic from that of the responsibility of the State under international law and that of international liability for acts not prohibited by international law.

5. The title of Part One, chapter II, had been changed to "Attribution of conduct to a State" and the draft articles contained therein had been reordered to improve the internal logic of the chapter.

6. The most significant change in Part One, chapter V ("Circumstances precluding wrongfulness"), concerned the provision on compliance with peremptory norms. The provision had previously appeared as article 21, recognizing compliance with the peremptory norm as a circumstance precluding wrongfulness. However, the Commission had decided to recast the provision in the form of a general exclusion clause to the effect that no State could rely upon a circumstance precluding wrongfulness in respect of conduct which violated a peremptory norm. In so doing, it had departed from its previous approach of dealing with the matter on a case-by-case basis. Furthermore, since the new formulation was applicable to all the circumstances listed in chapter V, it had been decided to place it towards the end of the chapter as new article 26. The Commission had also scrutinized the reference to the "international community as a whole" in article 25 ("Necessity") but had decided to retain the existing version since it had been resorted to by both the International Court of Justice and the General Assembly, the latter in the context of recently adopted international conventions.

7. The Commission had delayed its final approval of Part Two, chapter I, article 30 (b), which established the obligation of the responsible State to offer appropriate assurances and guarantees of non-repetition, if circumstances so required, because the issue was being considered by the International Court of Justice in the context of the *La Grand* case. However, it had decided to retain both that paragraph and a similar reference in article 48, paragraph 2 (a), on the understanding that the phrase "if circumstances so require" indicated that such guarantees and assurances did not form a necessary part of the legal consequences of all internationally wrongful acts and that in some situations, assurances and guarantees of non-repetition could be provided as a form of the remedy of satisfaction. The Commission had also decided to retain the reference to "injury" in article 31, paragraph 2, and to move former article 33, which dealt with other consequences of an internationally wrongful act, to Part Four as new article 56.

8. The Commission had adopted Part Two, chapter II, in its previous form with some drafting changes, including alignment of the text with the concept of "injury" adopted in article 31.

9. With respect to Part Two, chapter III, at its fifty-second session the Commission had proposed the deletion of the notion of "State crime" and the inclusion of the category of serious breaches of obligation towards the international community as a whole. After considering the matter at length, and in light of comments made by Governments, it had decided to retain the chapter on the understanding that article 42, paragraph 1, of the previous text, which dealt with damages reflecting the gravity of the breach, would be deleted. As part of that compromise, the previous reference to "a serious breach ... of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests" had been replaced by "a serious breach ... of an obligation arising under a peremptory norm of general international law"; the Commission had considered that the concept of peremptory norms was well established by virtue of its inclusion in the Vienna Convention on the Law of Treaties.

10. Articles 40 and 41 had been redrafted to reflect those understandings. The scope of article 40, paragraph 1, had been narrowed to cover serious breaches "by a State", and the Commission had decided to delete the previous reference to the risk of "substantial harm to the fundamental interests protected thereby" since a serious breach of a peremptory norm would necessarily imply such risk. The reference to "damages reflecting the gravity of the breach" had been reformulated in order to clarify the consequences of such a breach. There had been some concern that the use of the term "international community as a whole" in the draft articles might be broader than the reference to "the international community of States as a whole" in article 53 of the Vienna Convention; however, the Commission had taken the view that article 53 related to the defining of peremptory norms for the purposes of the Convention; that activity was carried out solely by the "international community of States as a whole", which was an important subset of the "international community as a whole".

11. Whereas the previous year the Commission had included a new Part Two bis on the implementation of State responsibility, which had contained provisions on the procedural and substantive aspects of the invocation of State responsibility, in 2001 the Commission had discarded the section on dispute settlement and retained only the part concerning the implementation of State responsibility. That part had become Part Three, comprising two chapters and 13 articles, which specified what action could be taken by States faced with a breach of an international obligation in order to secure the performance of the obligations of cessation and reparation by the responsible State.

12. In Part Three, chapter I, on the invocation of the responsibility of a State, the Commission had preserved the basic distinction between "injured State" in article 42 and a "State other than an injured State" in article 48, although some aspects had been controversial. Although it had been contended that the existence of "integral" obligations might be limited to multilateral treaties, the Commission had maintained a reformulated version of article 42, paragraph (b) (ii), in recognition of the existence of such a category of obligations, however, narrow, and to maintain a parallelism with article 60, paragraph 2 (c), of the Vienna Convention.

13. When the Commission debated chapter II of Part Three, on countermeasures, it had borne in mind Governments' comments regarding article 54 of the text drafted in 2000. Given the differing views within the Commission on that article, it was decided that what had become article 22, regarding the taking of a countermeasure as a circumstance precluding wrongfulness, would be kept in Part One, chapter V. The chapter on countermeasures had stayed in Part Three, but article 54 of the previous year's text had been deleted and replaced by a saving clause. As a compromise, article 53 of the previous year's draft had become article 52 and reformulated to remove the distinction between the taking of provisional countermeasures and countermeasures proper.

14. Article 50, paragraph 1 (e), of the draft presented in 2000 had become article 50, paragraph 2 (b), which the Commission felt was more logical. Article 52, dealing with conditions relating to the resort to countermeasures, had been recast as part of the broader compromise on countermeasures. That had led to the deletion of paragraph 4 of the previous year's text, the merging of existing provisions and some redrafting.

15. Article 54, which had been reworded as a without-prejudice clause, referred to "lawful measures" rather than "countermeasures" so as not to prejudice the issue either way. While article 22 recognized the taking of "countermeasures" only as a circumstance precluding wrongfulness, it did not per se exclude the possibility that the adoption of "lawful measures", within the meaning of article 54, would likewise preclude wrongfulness.

16. Part Four was largely unchanged, apart from the inclusion of a new article 56. That provision had formerly been article 33, but it had been moved in order to acknowledge its link with article 55 on *lex specialis* and to make it generally applicable to the whole regime of State responsibility.

17. The Commission had pondered the inclusion of provisions on the settlement of disputes, but had rejected that option on the understanding that attention would be drawn to the dispute settlement machinery referred to in the first-reading draft (A/51/10) as a possible means of settling disputes concerning State responsibility and that it would be left to the General Assembly to determine what form of provisions could be included, should it decide to elaborate a convention.

18. The wide-ranging discussion within the Commission about the final form of the draft articles had resulted in the recommendation that the General Assembly should take note of the draft articles on the responsibility of States for internationally wrongful acts in a resolution, to which the draft articles would be annexed, and that it should consider, at a later stage, the holding of a conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic. Furthermore, the Commission had been of the opinion that the issue of dispute settlement could be dealt with by that international conference, if it came to the conclusion that a legal mechanism for that purpose should be provided in connection with the draft articles.

19. The Commission had adopted a resolution by acclamation in which it recognized the invaluable contribution of the Special Rapporteur to articles which, it believed, would prove to be a major contribution to the codification and development of an important part of international law.

20. **Mr. Wood** (United Kingdom) said that his enthusiasm for the rigour and clarity of the Commission's work on important issues and for its careful analysis of State practice and case law had been vindicated by the completion of the draft articles on the responsibility of States for internationally wrongful acts.

21. The topic of State responsibility was of the highest importance, as was evidenced by the fact that the Commission's earlier drafts had been cited in judgements and advisory opinions of the International Court of Justice. He often referred to the draft articles and commentaries thereto because, although the subject might seem very abstract, it was fundamental to the structure of international law and international relations.

22. While it would be premature to say much in detail about the substance of the draft, the provisions on countermeasures represented a significant improvement. Nevertheless his delegation had some concerns about the article on necessity, since the concepts of "serious breaches" and "obligations owed to the international community as a whole" were vague. The commentaries, on the other hand, shed much light on the draft articles and were a useful contribution to an understanding of the law.

23. Since his delegation thought that the text of the draft articles required reflection and study, it reserved its position on future action concerning the text. It concurred with the first part of the Commission's recommendation, but considered it unwise to convene a conference on such specialized and delicate material. An opportunity was needed for the further development of that area of the law through State practice and case law. The adoption by the General Assembly of a consensus resolution annexing the draft articles and commending them to States would carry great weight and give the articles an appropriate status.

24. **Mr. Koskenniemi** (Finland), speaking on behalf of Denmark, Iceland, Norway, Sweden and Finland, said that State responsibility, as it was construed by the Commission, was the widest and potentially the most significant subject it had ever dealt with, and that was why some fundamentally diverging convictions existed about its place in the international legal system. Some people held that State responsibility stemmed from bilateral relationships and that a breach concerned only two States, or two groups of States, the holder(s) of a right and the State(s) that had violated that right. That view was reflected in many ways in the current draft, where the injured State played a key role in that it had

to invoke responsibility, choose what form reparation should take and decide what countermeasures, if any, should be adopted. Under article 20, it could even relieve the other State of responsibility by consenting to an act that would otherwise have constituted a breach.

25. While that was a realistic way to codify the present state of customary law on the matter, State responsibility had also always been regarded as an element of international relations where States not only competed with one another like gladiators, but were accountable to an international community of States as a whole. The latter notion of responsibility, which was denoted by the Latin terms *jus cogens* or *erga omnes* obligations, was disputed because of the suggestion that there might be a role for others apart from the injured State and the State committing the breach. The two different positions had always proved to be irreconcilable whenever the issue of international crimes and the taking of countermeasures by States that were not directly injured had been deliberated. Professor Ago had argued that since the Second World War there had been growing recognition that some norms were more important than others, and that that distinction should be reflected not only at the level of primary rules, but also in the consequences of infringements of those norms. Sir Hersch Lauterpacht had envisaged the subject as an international equivalent to domestic criminal law and had underpinned his argument that codification was necessary by pointing to developments such as the criminal responsibility of States and that of individuals acting on behalf of the State.

26. The quarrel over the distinction between "normal" and "more serious breaches" had been the single most important disagreement throughout the Commission's debates. Professor Ago had proposed that a distinction should be drawn between regular delicts and breaches of more fundamental norms and, while international lawyers had generally maintained that a hierarchy of norms did exist, they had been unable to agree what norms were most important and what the consequences of their infringement might be. The idea of punitive damages had been dismissed as unacceptable.

27. The compromise of 2001 made no mention of criminal responsibility, but in a number of articles it did highlight the existence of peremptory norms and obligations owed to the international community as a whole. It did not, however, identify those norms or obligations and provided for only very limited consequences of a breach thereof. The vexed question of countermeasures by States not directly injured had been dealt with by a clause that left the issue open for further development. Like any good compromise, the Commission's text could be called a victory of both the bilateralist and the communitarian schools.

28. The Nordic delegations were willing to accept the provisions of Part Three, chapter II, on countermeasures. Although resort to countermeasures was a matter of extreme delicacy, their use could not be ruled out, and the draft would be incomplete if it did not mention them. There had been no serious disagreement about the principle embodied in article 22 precluding the wrongfulness of an act that would otherwise constitute a breach, if taken as a lawful countermeasure.

29. The problem had been to allow for the use of countermeasures while ensuring against their abuse. Although it might seem best for countermeasures to be administered through international organizations, that approach would imply a centralized system of enforcement that did not yet exist. Since enforcement would therefore remain bilateral, most of Part Three, chapter II, was concerned with the limitations on countermeasures and attempted to reconcile the objectives of exhaustiveness, by including all relevant considerations governing their acceptability, and flexibility, by allowing for unforeseeable situations. Ideally, dispute settlement should have been given a stronger position in the system, but that would have required a greater willingness than States had yet shown to submit to a binding jurisdiction. Interpretation of the flexible terms of the draft articles would be left to the injured State itself, subject, of course, to the scrutiny of other States and international organizations.

30. The most ambitious aspect of the chapter was the provision on collective countermeasures contained in article 54. The Nordic delegations commended the efforts to establish a public law enforcement system in the case of a breach of obligations owed to the international community as a whole.

31. It was acceptable that the articles should distinguish between the breach of regular obligations and the breach of obligations of great importance to the international community; the draft articles as they

stood, however, made unfortunate distinctions between peremptory, or *jus cogens*, norms and obligations owed to the international community as a whole, or *erga omnes*. Part Two, chapter III, provided that in the case of serious breaches of peremptory norms all States should cooperate to bring an end to the breach and that no State should recognize as lawful a situation created by such a breach. In the case of obligations to the international community as a whole, on the other hand, article 48 provided that all States were entitled to demand cessation and specific performance. It was not clear why the two categories were treated separately and differently: why, for example, breaches of peremptory norms must be serious in order to give rise to the stated consequences, whereas breaches of obligations *erga omnes* were not so qualified, or why the duty of non-recognition was mentioned in regard to the former but not to the latter, apparently an intentional omission, since the commentary to article 48, paragraph 2, stated that the list of categories of claims was exhaustive.

32. It was generally agreed that the distinction between peremptory norms and obligations owed to the international community as a whole was obscure. Since the Commission's own commentary acknowledged that the two categories overlapped, as, for example, in the areas of aggression, basic human rights and the right of self-determination, questions would arise as to which regime was applicable.

33. Although unfortunately reduced to a simple saving clause, article 54, on measures by States other than an injured State, did go some way towards recognizing the principle that all States were entitled to take countermeasures in case of a violation of an obligation owed to the international community as a whole. It also reiterated the principle reflected in article 48 that States might call for cessation and reparation in the interest of beneficiaries of the obligation breached — such as individuals or groups of individuals — other than the injured State. Less fortunately, the wording of article 54 seemed to exclude the possibility of collective countermeasures in case of a breach of a *jus cogens* obligation unless it was simultaneously a breach of an obligation *erga omnes*, or at any rate to leave the matter open to dispute. To clarify the discrepancy between the two regimes, a link should be created between articles 41, 48 and 54, perhaps through a less restrictive wording of paragraph 3 of article 41.

34. Although some might be disappointed by the idea that the draft articles should be adopted as an annex to a General Assembly resolution, the Nordic delegations felt that that was the most appropriate form, one which would ensure the unity and rapid adoption of the draft articles and put them in the strongest position. Once so adopted, they would become the most authoritative statement available on questions of State responsibility, representing the condensation of customary law and all treaties and conventions touching on the matter. If they were to take the form of a convention, they would be subject to the whims of politics and eroded by the compromises inherent in a diplomatic conference. But as a restatement of customary law, the articles and related commentaries would remain the authoritative text until superseded by future international developments, as customs changed to reflect new principles and priorities.

35. **Mr. Bennouna** (Morocco) said that the draft articles on State responsibility, just completed after over 40 years of work, filled in some essential gaps in the architecture of international law by elaborating the secondary rules that set forth the consequences of breaches of the primary rules that States were obliged to follow. Some decades ago, the broad topic of State responsibility had wisely been narrowed to focus on the responsibility of States for internationally wrongful acts, as the newly adopted title sensibly indicated. As a result, other aspects of State responsibility not involving wrongfulness or even fault, but dealing with the actual damage caused, had been set aside to be dealt with separately under the heading of international liability for injurious consequences arising out of acts not prohibited by international law, with a focus on the prevention of transboundary harm. Diplomatic protection, that very specialized field of State responsibility, had also been earmarked for separate treatment.

36. Even thus narrowed, however, the draft articles on State responsibility constituted the keystone of the system. His delegation felt that the draft articles adopted by the Commission were well balanced and were for the most part a reflection of existing positive law.

37. His delegation shared the concern that the provisions on countermeasures might tend to legitimize their abuse by stronger States. However, it had been persuaded by the argument that the draft articles should, for that very reason, deal with a State's

response to a wrongful act by another State, so that the use of countermeasures could be kept within bounds. His delegation attached great importance to strict compliance with the conditions relating to resort to countermeasures in article 52, in particular the requirement of notification and negotiation prior to taking countermeasures; moreover, it interpreted the urgent countermeasures mentioned in article 52, paragraph 2, as being limited to the kinds of measures given as examples in the commentary, such as the freezing of assets.

38. His delegation hoped in time to see a dispute settlement mechanism developed to supplement article 52. It also attached the greatest importance to the provisions of article 50 that stipulated that countermeasures could not involve the threat or use of force or the violation of humanitarian law or other peremptory norms. It should be stressed that countermeasures in keeping with the draft articles must not be punitive but must be aimed at inducing a State to comply with its obligations.

39. A question not settled in the draft articles was whether individual countermeasures should cease as soon as collective countermeasures were taken by an international organization such as the United Nations. The draft articles were to be interpreted in conformity with the Charter of the United Nations, but the Charter itself was silent on the point with respect to measures not involving the use of armed force. It could be argued, however, by analogy with Article 51 of the Charter concerning the right of self-defence, that a State should cease its own countermeasures once the Security Council had ordered collective economic sanctions.

40. His delegation fully supported the Commission's wise decision to omit the controversial concept of international crimes of a State, and instead to draft articles on serious breaches of obligations under peremptory norms of general international law. The provisions codified consequences of breach of *jus cogens* norms that were already established in jurisprudence and complemented the notion of peremptory norms set forth in the Vienna Convention on the Law of Treaties. His delegation did not agree with the criticism that the Commission had ventured into the sphere of primary rules. Rather, it was drawing the consequences, on the level of secondary rules, by postulating the need for global cooperation in the face of a breach of such norms.

41. His delegation was surprised that the Commission had recommended that the General Assembly should merely take note of the draft articles in a resolution and annex the articles to the resolution, deferring to some indefinite time the idea of concluding a convention on that basis. It seemed a very inglorious outcome for so many decades of work on so vital a topic. The Commission was an expert body, which had submitted its best effort, but the task of deciding what should be done with it belonged to the political body, the General Assembly. Before such a decision was made, the monumental work surely merited in-depth consideration by an ad hoc group or an open-ended working group, which would refrain from reworking the details but would give further thought to the significant choices made.

42. **Mr. Mansfield** (New Zealand) said that the completion of the draft articles on the topic of State responsibility, which had been the result of dedicated efforts by past and present members of the Commission, represented a significant milestone. The work over the past quinquennium, in particular, had resulted in a valuable clarification of the relationship between the various parts of the draft articles and thereby the central concepts of the basis of responsibility. The draft articles were, as a consequence, comprehensive, well balanced and well structured. The Special Rapporteur's contribution was particularly commendable. It was most gratifying that the Commission's work in 2001 had addressed the comments made by States in the Sixth Committee at the fifty-fifth session of the General Assembly. Issues which had caused difficulties for States had been recast and solutions found. That would greatly assist the acceptance of the draft articles by States.

43. His delegation welcomed the retention of the provisions on serious breaches in chapter III of Part Two. The widely held concern that provision should be made for a situation where there had been a breach of an obligation owed to the international community and in which every State had an interest in ensuring compliance was well reflected in the draft articles. The change had contributed significantly to the balance of the text as a whole; it was a considerable achievement on the part of the Commission to find a solution to a difficult conceptual issue.

44. Part Three represented a significant advance in the conceptualization of the topic. Of particular importance was the shift from the concept of the

responsible State to the concept that a State had a right to invoke responsibility; and the recognition of the important distinction between injured States and States with a legal interest in the performance of an obligation was most welcome. His delegation agreed that States in the latter category should be able to invoke responsibility for the breach of an obligation, although they should not be entitled to receive the full range of remedies available to States which had suffered actual injury.

45. His delegation supported the inclusion of the provisions on countermeasures. The use of countermeasures to induce performance of an obligation was recognized in customary international law, as had been confirmed by the International Court of Justice. The Commission had clearly given careful thought to the possibility that the right to take countermeasures could be abused, and the draft articles were consequently well balanced, providing a framework that would deter such abuse and ensure that the application of countermeasures was both necessary and proportionate. The adoption of the provisions did not, however, alter in any way the basic principle that the application of countermeasures should not stand in place of dispute settlement and that countermeasures should not be imposed if attempts to resolve a dispute were continuing in good faith.

46. In that context, the fact that the provisions on collective countermeasures had been removed from the text — although his delegation might have been able to accept the concept — was an important step in making the draft articles acceptable to others. At the same time, it had been right to include article 54, since it did not prejudice the current position under international law of the right of a State with an interest in the performance of a legal obligation to take lawful measures that would ensure cessation of the breach and reparation in the interest of the injured State or States. Indeed, the inclusion of draft article 54 as a saving clause played an important role in the balance of the text as a whole, while the further development of principle and practice relating to the issue remained open.

47. In view of the fact that the draft articles represented both the codification and the progressive development of international law, the Commission had made a commendably careful recommendation to the Committee as to the form that the draft articles should take. Although it was to be hoped that they would be broadly acceptable to all States, the Commission's recommendation that the General Assembly should take note of the draft articles in a resolution and annex the text to the resolution struck an appropriate balance between a recognition of the significance of the completion of work on the topic and the need for States to be able to consider the draft articles in their entirety more fully before moving towards their adoption.

48. While fully acknowledging the views of States which would prefer the adoption of a convention, his delegation was concerned to ensure that the draft articles were given due consideration by States before any such decision was taken. The non-adoption of the draft articles for the time being did not detract from their current status in customary international law nor from their importance as a vital chapter in the development of international law. Indeed, the precipitate adoption of the draft articles as a convention could weaken the Commission's work, in that the draft articles constituted an internally consistent whole. While it was likely that all States, including his own, would have their own views on the individual elements of that whole, the articles should be assessed in their entirety. To negotiate the content of a convention based on the draft articles so soon after they had been made available to States entailed the danger that too much consideration would be given to individual elements of the text rather than the sum of its parts. It would be a mistake to move too soon to a process that might cause the Committee to go back over issues that had already been resolved and upset the existing careful balance.

49. Thus, while his delegation could support the Commission's recommendation that the Committee should restrict itself to taking note of the draft articles, it questioned whether it was necessary or desirable for any decision to be taken at all at the current session. The commentaries on the draft articles were extensive, and Governments, including his own, could not have absorbed them all. They should be given time to digest the report before taking any formal decision. That would not be to shelve the Commission's work but rather to give it the respect it deserved. The draft articles would in any case stand as an authoritative study of current rules, State practice and doctrine and, as such, would be the definitive source of the rules for the development of customary international law.

50. **Mr. Maréchal** (Belgium) said that the Commission's work on State responsibility over many

years probably constituted its most important achievement. The draft articles, which represented a significant advance in the codification of international law, would take their rightful place with the laws on treaties and the peaceful settlement of disputes. International law had, since the *Chorzow factory* case of 1928, considered State responsibility as the simple obligation of reparation for any breach of a commitment. Through the efforts of successive special rapporteurs, culminating in the tenure of Mr. James Crawford, the Commission had produced an impressive set of 59 draft articles and 300 pages of commentary.

51. The completion of the work on the topic would lead to greater harmony in international relations, since the draft articles were simple, clear and consistent. They maintained a balance between customary law and a number of innovative elements, including provisions relating to serious breaches of obligations to the international community as a whole, the definition of an injured State and countermeasures, all of which would tend to favour the progressive development of international law.

52. The Commission was to be commended for having jettisoned the controversial concept of international crimes of States and for instead adopting an approach which recognized the existence of a special category of particularly serious breaches, namely breaches of essential obligations to the international community, and made them subject to a more rigorous regime of state responsibility. It had thus determined that the development of the concepts of *jus cogens* and *erga omnes* obligations had consequences for secondary rules and should be reflected in the draft articles. Rather than establishing a distinction between international crimes and international delicts, it had adopted the concept of peremptory norms, which had the added benefit of being recognized by the Vienna Convention on the Law of Treaties.

53. The definition of an "injured State" took account of the growing diversity of international obligations and the distinction between injured States and States which, although not directly injured, nevertheless had a legal interest in the implementation of the obligation in question. Into that category came the rules governing international responsibility for attacks on human rights or on the provisions of international humanitarian law relating to *jus cogens*. The chapters devoted to general principles and to forms of reparation, which were clear, concise and well structured, were particularly relevant in the current circumstances. The Commission had found the right balance between forms of reparation based on the principle of full compensation and the flexibility required not to overburden the obligation of reparation.

54. The Commission had taken a risky step in attempting to regulate countermeasures in order to limit their use. However, the acknowledgement of the right to take countermeasures should indeed be accompanied by appropriate limitations on their use; they should be applied only in exceptional circumstances and with due regard for the current international situation and, if essential, they should be applied proportionately and objectively. In any case, they should not replace serious efforts at peaceful dispute settlement.

55. As for the action to be taken on the draft articles, his delegation could accept the Commission's recommendation that the General Assembly should deal with the topic stage by stage, initially noting the draft articles in the framework of a resolution and only then proceeding to the convocation of an intergovernmental conference to examine the draft articles with a view to adopting a treaty. As it stood, the text was the result of a compromise and there was certainly room for improvement. It was therefore to be hoped that more time would be allotted to the topic and that the text could be enhanced by further debates on doctrine and judicial decisions.

56. **Ms. Xue** Hanqin (China) commended the completion of the draft articles after 46 years of arduous effort on the part of the Commission. Generally speaking, the draft articles adopted on second reading were extremely rigorous in structure and rich in substance. The Commission had also attained a balanced text by carefully weighing different positions regarding various controversial issues, thus paving the way for its acceptance by all parties.

57. Chapter III of Part Two dealt with some of the most controversial issues arising during the course of the Commission's work. Her delegation was appreciative of the fact that the Commission had replaced the term "international crimes of States", first, by the term "serious breaches of obligations to the international community as a whole" and subsequently to "serious breaches of obligations under peremptory norms of general international law", where "serious breaches" were defined as "gross or systematic" failure

to fulfil such obligations. Given that article 53 of the Vienna Convention on the Law of Treaties contained a widely accepted definition of "peremptory norm", the phrase "obligations under peremptory norms of general international law" had a more definite meaning and was easier to comprehend.

58. Her delegation remained concerned, however, that the concept of "serious breaches" could still give rise to controversy in practice, since it was not clear who should judge whether an internationally wrongful act constituted a serious breach. If it was left to States, they might arrive at different conclusions, which would have repercussions on the provisions of draft article 41, paragraphs 1 and 2, and would thus adversely affect the stability of the international legal order. Security Council resolutions also entered the equation. There was a need to clarify whether in cases involving a threat to international peace and security, for example, obligations under the draft article could arise only after the Security Council resolution had been adopted.

59. With regard to article 48, her delegation accepted that any State other than an injured State might express an appropriate form of concern if the obligation breached was owed to a group of States or the international community as a whole, and might even demand that the responsible State should cease the internationally wrongful act; it doubted, however, whether it was appropriate to elevate such actions to the level of a State's legal responsibility. Moreover, China was concerned at the uncertainty in respect of the contents of the obligation breached, whether owed to a group of States for the protection of their collective interest or to the international community as a whole. Such an approach was likely to lead to controversy and abuse, for it was difficult to arrive at agreed criteria for judgement in such matters.

60. According to draft article 45 and paragraph 3 of draft article 48, if the injured State had waived its right, or was regarded as acquiescing in the loss of its right, to invoke the responsibility of the responsible State, no third State had the right to invoke that State's responsibility in its own interest. However, that did not seem consistent with the nature of the obligation breached, which according to article 48 had to be one "established for the protection of a collective interest of the group" or owed to the international community as a whole. In that light, it seemed that the injured State should not be entitled to waive its right unilaterally. Moreover, it was not clear whether a third State could invoke responsibility before the acquiescence of the injured State in the loss of its right was firmly established.

61. Another issue relevant to draft article 48 was the concept of "the beneficiaries of the obligation breached" in paragraph 2 (b), which appeared to confer on third States the right to invoke responsibility in the interest of individuals or other non-State entities, even if they were not nationals of the responsible State or of the third State concerned. The right so conferred was too broad and was likely to lead to disputes among the States involved.

62. The question of countermeasures had always been controversial. Her delegation had consistently argued that countermeasures were permissible under international law if taken by an injured State to compel cessation of the act and safeguard its interests. In order to prevent abuse of that right, however, appropriate restrictions must be placed on it. A proper balance had been struck in chapter II of Part Three, with the deletion of the provision in the original draft article 54 that enabled States other than the injured State to take countermeasures, and the introduction of a saving clause in the new draft article 54. However, the new article failed to define "lawful measures". If they included countermeasures, the new provision would have the same effect as the old one. His delegation maintained its objection to expanding the range of States entitled to take countermeasures and introducing collective elements such as "collective intervention" or "collective sanctions".

63. The new draft contained no provisions on dispute settlement. However, because State responsibility was such a sensitive and controversial topic, it was very important for the draft articles to feature the principle that States must abide strictly by the obligation to settle their disputes by peaceful means, in accordance with Article 2, paragraph 3, and Article 33 of the Charter of the United Nations. A mechanism for settling disputes arising from State responsibility could be adopted along the lines of the provision contained in the draft articles adopted on first reading. The General Assembly, in deciding on the conclusion of an international convention on State responsibility, should also decide whether such a mechanism should be included.

64. Her delegation had no objection to the recommendation in the report that the General

Assembly should take note of the draft articles in a resolution, and annex the draft articles to the resolution.

65. **Mr. Abraham** (France), while congratulating the members of the Commission on their report, expressed regret at the delay incurred in circulating it. The Secretariat should not regard publication on the Commission's web site as a substitute for publication in the official languages of the United Nations.

66. The current text of the draft articles on State responsibility showed considerable improvement on its predecessors. He welcomed the Special Rapporteur's decision to abandon the punitive logic of the draft adopted on first reading, and to avoid dwelling on the definition of the primary obligations supposedly breached. Paragraph 1 of the new draft article 40 contained a new definition of an internationally wrongful act. Instead of the language used in the 1969 Vienna Convention on the Law of Treaties, which referred to norms recognized by "the international community of States as a whole", a serious breach was now defined in relation to "a peremptory norm of general international law". It was not yet clear which rules could be so defined, so the new definition was no better than the old one. However, it was a useful way of avoiding the need to draw up a list of primary obligations.

67. Draft article 40 also drew a distinction between "serious" and other breaches, the former consisting of a "gross or systematic" failure by the responsible State to fulfil an obligation arising under a peremptory norm of general international law. That would make room for both "serious" and less serious breaches, for instance, of the obligation under Article 2, paragraph 4, of the Charter to refrain from the threat or use of force, and such a distinction could have undesirable consequences.

68. He welcomed the Commission's decision to delete paragraph 1 of the former draft article 42, requiring the responsible State to make reparation. However, the new paragraph 1 was ambiguous in its scope. He was afraid it might encourage some States to use countermeasures unlawfully.

69. France had suggested during the Committee's previous session that chapter III of Part Two should be deleted in its entirety, and he was still unpersuaded that it was necessary to retain it.

70. Concerning countermeasures, the International Court of Justice had affirmed, in the case concerning the Gabcikovo-Nagymaros Project, that they were lawful in circumstances which did not preclude their wrongfulness. His delegation would have preferred the title of Part One, chapter V, to be "Circumstances precluding responsibility", as a means of indicating that the draft articles dealt only with secondary rules.

71. His delegation held to the view that the provisions on countermeasures should not feature in the draft articles, which should be confined to provisions for reparation and for the cessation of the internationally wrongful act. However, chapter II of Part Two was a useful indication of the allowable extent of countermeasures, the rules for which had thus far been derived from customary international law and had been vague and controversial. The right to take countermeasures must be reconciled with the need to limit abuses of that right. In that regard, he supported the provisions on the proportionality of countermeasures and their cessation. Notwithstanding the prohibition in paragraph 3 of draft article 52 against taking countermeasures if the dispute was pending before a court or tribunal with the authority to make decisions binding upon the parties, he thought the injured State should be entitled to take "such urgent countermeasures as are necessary to preserve its rights" (draft article 52, para. 2), even in such circumstances. He welcomed the prohibition against taking or continuing them if the internationally wrongful act had ceased.

72. As for measures taken by States other than an injured State, he did not accept that draft article 54 was a "saving clause", since it implied that a State having only a legal interest in the matter could take countermeasures against the responsible State, for the sake of obtaining cessation or reparation in the interest of the injured State. That question should be explored in much greater detail.

73. On the question of dispute settlement, there was no reason to single out disputes arising from issues of State responsibility for a special ad hoc settlement procedure. Moreover, disputes about responsibility alone were rare; most disputes, though implying responsibility, were about matters of substance, and the settlement of disputes was covered by many of the principles and rules of general international law. He therefore welcomed the Commission's decision not to

include any provisions on dispute settlement in the draft.

74. Finally, as to the form of the draft articles, a General Assembly resolution with the text of the draft articles annexed could be an appropriate solution, to be followed by a recommendation by the General Assembly for a convention based on the draft articles. That had been the approach taken to the draft articles on State succession and its impact on the nationality of natural and legal persons

75. **Mr. Masud** (Pakistan) said that his delegation intended to make a single statement on some of the items on the Commission's agenda which were of direct interest to it.

76. On the topic of State responsibility, which covered a number of important and complex issues, his delegation felt that parts of the draft articles, such as those on countermeasures and measures taken by States other than an injured State, might create some problems. He therefore supported the Commission's recommendation on the holding of a diplomatic conference, in due course, to negotiate a convention on the basis of the draft articles. As for the recommendation that the General Assembly should adopt a resolution taking note of the draft, he suggested the text need not be annexed if that would cause difficulties for some delegations.

77. The draft articles on international liability for injurious consequences arising out of acts not prohibited by international law still required some work, and the adoption of a convention on the topic would be somewhat premature. The concept of significant transboundary harm had to be elaborated and clarified, along with the obligations of States to take all appropriate measures to prevent it and to require prior authorization of activities within the scope of the draft. He suggested that the Sixth Committee could set up a working group to continue work on the topic, pending the adoption of a convention.

78. On the topic of reservations to treaties, he expressed the view that the rules on reservations laid down in the Vienna Conventions on the Law of Treaties, on Succession of States in respect of Treaties and on the Law of Treaties between States and International Organizations or between International Organizations had worked well, and had acquired the status of customary norms. It might not be wise to derail them now. The regime of reservations incorporated in the first of those instruments struck a good balance between preserving the text of treaties, by requiring reservations to be compatible with their object and purpose, and the goal of universal participation. Pakistan did not draw any distinction, for the purpose of reservations, between human rights treaties and others; nor did the Vienna Convention on the Law of Treaties. If a different regime, prohibiting reservations, were established for human rights treaties, the aim of universal participation in those treaties would be impaired.

79. Nor did Pakistan favour the establishment of monitoring bodies to determine the nature or validity of reservations expressed by States, which would also hinder that objective. States should themselves ensure that their reservations were consistent with the object and purpose of the treaty. However, the Commission's work on the topic of reservations was designed to offer guidelines to States and would not alter the existing regime of the Vienna Convention; as such his delegation did not object to it.

80. Pakistan supported the Commission's work on diplomatic protection and on unilateral acts of States. It appreciated the cooperation between the Commission and other bodies, and was conscious of the importance of the International Law Seminar held regularly at the United Nations Office at Geneva. As decided by the Commission, its next session should be held at Geneva in two parts.

The meeting rose at 1.05 p.m.

United Nations A/C.6/56/SR.12

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Chairman: Mr. Abdalla (Vice-Chairman) ..... (Sudan)
later: Mr. Lelong (Chairman) ..... (Haiti)

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Statement by the President of the International Court of Justice

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In the absence of Mr. Lelong (Haiti), Mr. Abdalla (Sudan), Vice-Chairman, took the Chair.

The meeting was called to order at 10.10 a.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10)

1. **Mr. Yamada** (Japan), referring to chapter IV of the report (A/56/10) welcomed the fact that, after half a century of dedicated efforts, the Commission had completed a set of draft articles on responsibility of States for internationally wrongful acts. Its Government strongly supported the recommendations made by the Commission in paragraphs 72 and 73 of the report. Although Japan fully appreciated that some Governments might wish to adopt a convention on the topic of State responsibility in the near future, it considered that such action would be premature and therefore believed that the ingenious two-stage approach suggested by the Commission reasonably satisfied both positions. The second-generation articles reflected recent developments in the law on State responsibility, which meant that States, courts and scholars needed time to study and appraise them.

2. His Government supported the overall text and was pleased that all reference to international crime had been expunged from it. His country recognized the existence of serious breaches and of qualitative differences between serious breaches and ordinary breaches and held that States should cooperate to suppress serious breaches. The development of international law in respect of such breaches would safeguard the interests of the international community as a whole. The moot point was whether the legal consequences flowing from serious breaches were different from those stemming from ordinary breaches. Even though Japan was not fully convinced that it was necessary to maintain the category of serious breaches, it understood and accepted the new provisions — which established that States had an obligation of non-recognition, non-assistance and cooperation to bring such breaches to an end — since they represented a delicate compromise among diverging opinions.

3. Although the Commission obviously intended to clarify and limit the scope of the rather vague concept of the "international community as a whole" by introducing the idea of peremptory norms, the latter term had been instituted and developed in the law of treaties; it was not necessarily intended to affect the law of State responsibility. Its inclusion in that law inevitably established a link with the law of treaties and might have unexpected results. While his Government was not opposed to the use of the term "peremptory norm" in article 40, it thought that extra caution was required in defining and developing the content thereof.

4. The introduction of a "without prejudice clause" in article 54 to replace the subrogation of the right of an injured State to take countermeasures was commendable, since it remained within the bounds of codification and progressive development, but did not exclude the possibility that States other than the injured State might at some time in the future play a role in re-establishing the legality of the norms that had been breached.

5. Fortunately the new text clarified the relationship between "damage" and "injury", because article 31, paragraph 2, indicated that "injury" was a wider concept than "damage". Furthermore, articles 42 and 48 and the commentary thereto elucidated the relationship between "injury" in article 31 and the notion of "injured" (as in "an injured State"). Moreover, it was implied that the entitlement of States other than injured States to invoke responsibility was based on a certain kind of affectedness falling short of injury. That notion was more suitable in multilateral legal relations than the concept of "infringement of rights", which had appeared in article 40 the first-reading text, and Japan basically supported that approach.

6. While article 42 was closely modelled on article 60 of the Vienna Convention on the Law of Treaties, it was intended to cover all international wrongful acts arising out of all kinds of obligations and it might therefore prove difficult to distinguish between the integral obligation implicit in article 42, paragraph b (ii) and the obligation established "for protection of a collective interest" referred to in article 48, paragraph 1 (a). Even though a category of integral obligations might be recognized in article 60 of the Vienna Convention, in reality it seemed hard to differentiate between an obligation of an interdependent character and an obligation established for protection of a collective interest, yet the distinction between those two categories of obligations was fundamental, because it determined whether a State was entitled to make claims for full reparation and to take countermeasures

as an injured State. His Government therefore called for caution in defining the notion of an integral obligation.

7. His observations were intended to prompt further reflection on a set of draft articles which would provide a valuable and reliable guide. For that reason, he hoped that the General Assembly would adopt a resolution as recommended by the Commission.

8. **Mr. Popkov** (Belarus) welcomed the completion of the Commission's work on the draft articles on responsibility of States for internationally wrongful acts, which were so important that they should take the form of a convention. To date, State responsibility had been regulated by customary international law and its implementation had therefore proved rather difficult. The strengthening of international legal rules relating to State responsibility through a binding international instrument would undoubtedly enhance the effective application of those rules as a whole. Moreover, the results of the Commission's work should, as a general rule, be embodied in legally binding instruments, as that was the only way in which the Commission could fully play its role in the codification and progressive development of international law. An international conference of plenipotentiaries should therefore be convened in order to secure the widest possible participation of States in the discussion of the articles with a view to concluding a convention on the topic. His delegation also supported the Commission's recommendation that the General Assembly should adopt a resolution on the draft articles.

9. The agreement reached on the need to include provisions on countermeasures in the draft articles would guarantee the genuine implementation of enforcement measures against responsible States and limit the possibility of abuses in that respect. For that reason, his delegation welcomed the approach to countermeasures in Part Three, which emphasized that such measures should be seen not as a means of punishing a State for wrongful conduct, but as a remedy for the infringement of international law.

10. It had been a mistake to disregard the possibility of adopting collective enforcement measures, such as sanctions, against States which had committed internationally wrongful acts, because the application of such measures by international organizations might be an efficacious means of bringing pressure to bear on the responsible State and persuading it to fulfil its obligations to another State, a group of States or the international community.

11. It was important to retain the provisions on dispute settlement, which had been contained in the first-reading text of Part Three, in a draft convention. The inclusion in a draft convention of a special section dealing with dispute settlement procedures was of fundamental importance to the implementation of an international regime of State responsibility, as was the incorporation of provision for mandatory international arbitration proceedings or reference to the International Court of Justice in the event of disputes connected with the adoption of countermeasures. The possibility of any abuses when countermeasures were taken should be precluded; arbitration would offer some safeguards against such abuses. The wary attitude of some States to binding arbitration was motivated by political, rather than legal considerations. The outcome of arbitration was less predictable than the solution of disputes by other means, especially for States in a strong political and economic position. For weaker States, however, the settlement of disputes by arbitration would be the best means of protecting their interests. The lack of any reference whatsoever in the draft articles to binding judicial procedures was a retrograde step running counter to the trend in respect of the settlement of international disputes. The whole question should therefore be reconsidered. Even if the provisions on the binding settlement of disputes did not apply to primary rules, a court or tribunal could solve a significant range of disputes regarding State responsibility.

12. There was no direct contradiction between Part Three of the text adopted on first reading or possible provisions on the mandatory settlement of disputes linked to the application and interpretation of an international convention on the one hand and the principle of the freedom to choose peaceful means of dispute settlement set forth in Article 33 of the Charter of the United Nations on the other.

13. Article 48 was progressive in nature in that it took into account the modern concept of *erga omnes* obligations. His delegation therefore looked forward to further discussion of that issue at a conference of plenipotentiaries, since the maintenance of provisions on that subject in an international instrument would depend on the political will of States.

14. He hoped that the Commission would once again focus its attention on the formulation of international

instruments dealing with the responsibility of international organizations, since article 57 did not cover either the responsibility of Member States for wrongful acts committed by those organizations or the scope or character of their responsibility.

15. *Mr. Lelong took the Chair.*

16. **Mr. Hoffmann** (South Africa), speaking on behalf of the States members of the Southern Africa Development Community (SADC) and referring to chapter IV of the report, said that most of the draft articles on State responsibility were supported by judicial authority and State practice over many years. Moreover, several of the articles had been cited with approval by the International Court of Justice. There were, however, articles dealing with the impact of concepts of *jus cogens* and obligations *erga omnes* which were innovations with less support in State practice.

17. SADC believed that, in principle, the draft articles should be referred to a diplomatic conference for adoption in treaty form. There were, however, special circumstances which made some delay desirable.

18. First, the draft articles covered a wide field and raised a number of complicated issues that required careful consideration by States. Second, most of the articles reflected customary international law and did not require translation into treaty form. Third, it was unlikely that a treaty reflecting the draft articles would be ratified by many States. The treaty would take years to come into force, and that would impair the authority and credibility of the draft articles. Fourth, the draft articles in their final form balanced competing rules, interests, values and principles. There was a real danger that a diplomatic conference, by amending or rejecting some of the articles, might undermine the integrity and coherence of the text.

19. For those reasons, SADC supported the Commission's recommendation that at the current stage, the General Assembly should take note of and annex the text of the draft articles to the resolution to be adopted. The Community believed, however, that the Sixth Committee should express its approval of the Commission's achievement by welcoming the draft articles and commending them to States for their consideration.

20. With regard to some of the more controversial aspects of the draft articles, he said that SADC welcomed the removal of article 19. While individual criminal responsibility for violations of international law had become accepted, to the extent that it formed the basis of the Rome Statute of the International Criminal Court, the international legal order was simply not yet ready for the concept of State criminal responsibility. No international court capable of trying or ordering the punishment of a State existed nor could the *mens rea* of a State, as opposed to that of an individual, be determined. As confirmed by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Blaskić*, the general principles of criminal law were in practice difficult to apply to a State. It was therefore best to focus on individual criminal responsibility for the time being. The Commission had been wise, however, not to abandon the underlying foundation of article 19, namely that contemporary international law drew a distinction between "ordinary" violations of international law that affected only a particular State or States and more serious breaches that affected all States and the international community as a whole.

21. Article 40 provided that where there had been a serious breach by a State of an obligation arising under a peremptory norm of general international law, all States must cooperate in bringing the breach to an end and withhold recognition of the lawfulness of the situation. In particular, prohibitions on aggression, slavery, genocide, racial discrimination, apartheid, torture and denial of self-determination had a special status in contemporary international law, being norms of *jus cogens* whose violation concerned the international community as a whole. The provisions of article 41 thus had a special significance for SADC, since non-recognition and non-assistance had been the sanctions applied to South Africa's administration of Namibia and the Bantustan States and to Rhodesia.

22. Article 48 wisely gave States the right to invoke responsibility for breaches of obligations owed to the international community as a whole. The provision overruled the notorious decision of the International Court of Justice in the 1966 *South West Africa* case, in which the Court had held that Ethiopia and Liberia were not entitled to a finding that apartheid as applied in Namibia failed to promote the best interests of the people of Namibia, on the grounds that they lacked a legal interest in their welfare. The decision, which had

rightly been condemned by the international community, had been a major setback to the advancement of racial justice in southern Africa. SADC therefore welcomed the Commission's explicit repudiation of the decision, which accorded with the Court's decision in the *Barcelona Traction* case, recognizing that certain community interests affecting important values concerned all States.

23. Although, under article 48, paragraph 2, a non-injured State could claim from the responsible State cessation of the wrongful act, assurances of non-repetition and reparation in the interest of the injured State or other beneficiaries, he wondered whether such a State could go further and take non-forcible countermeasures, either on its own or jointly with others, to bring the breach to an end and secure reparation for the injured State or other beneficiaries. There was clearly support for such action. For example, in 1986 the United States had violated treaty obligations owed to South Africa when it had suspended the landing rights of South African Airways in the United States to compel South Africa to abandon apartheid. Similarly, Great Britain had violated its aviation agreement with Yugoslavia in 1998 as a countermeasure to Yugoslavia's oppression of the Albanians in Kosovo. The practice was, however, still at an early stage and the Commission had wisely refrained from endorsing it. Article 54 left the matter to be resolved by the further development of international law.

24. The whole issue of reprisals or countermeasures was controversial. They had no place in a developed and centralized legal system, but, unfortunately, international law had not yet progressed to that stage. The draft articles recognized the reality but sought to ensure, by subjecting the application of countermeasures to stricter conditions and limitations, that they would not be abused. SADC reluctantly agreed that currently that was the only course that could be adopted.

25. Article 8, which attributed responsibility to a State for the conduct of persons if they were under the direction or control of that State in carrying out their actions, was of particular importance. In its commentary, the Commission rightly pointed out that whether a State exercised control over the conduct of a given person was a question of fact, to be determined in each case. It had therefore been unnecessary for the International Criminal Tribunal for the Former Yugoslavia to disagree, in its ruling in the *Prosecutor v. Tadić* case, with the decision by the International Court of Justice in the Nicaragua case.

26. SADC considered that the commentaries to the draft articles constituted a major contribution to the literature on State responsibility, being readable, informative and practical. Tribute was due to the Special Rapporteur, who had struck a happy balance between the brevity of other commentaries and the prolixity of the Ago commentaries on the articles adopted on first reading.

27. **Mr. Lammers** (Netherlands), referring to the form that should be chosen to give the articles maximum effectiveness, said his delegation fully endorsed the Commission's recommendation (A/56/10, para. 72), that the General Assembly should take note of the draft articles in a resolution. As for the recommendation (para. 73), that an international conference might be convened at a later stage with a view to concluding a convention, his delegation, while not excluding the possibility altogether, was as it had indicated in its written observations on previous drafts, doubtful about the usefulness of a convention. There was the risk of jeopardizing much of the *acquis* in the text of the articles, the danger that ratifications would not be forthcoming and the intricacies surrounding the inclusion in the articles of a dispute settlement mechanism. On the other hand, a General Assembly resolution, taking note of — or, preferably, "welcoming" — the articles would have no such disadvantages. After all, the draft articles largely reflected customary international law, so not much would be added to the development of international law by incorporating them in a convention.

28. As far as the Commission was concerned, the text of the draft articles was final and he had no intention of proposing any amendments. He noted, however, that, although — as his Government had already noted in its written observations — the replacement of the concept of "international crime" by the concept of "serious breaches of obligations under peremptory norms of general international law" might have been necessary in order to reach consensus within the Commission, it was, nonetheless, regrettable that the list of examples of international crimes contained in the previous draft had also been abandoned. All that was left was a framework which would need to be filled in by case law and development of the law in general. Furthermore, while recognizing that the introduction of

the concept of "serious breaches" was an acceptable compromise, the specific legal consequences of the commission of such a breach were still insufficiently elaborated, compared with the consequences included in the draft articles as adopted on first reading. His delegation would have welcomed a provision to the effect that in the event of serious breaches the legal consequences for the responsible State would be correspondingly serious.

29. He commended the fact that the scope of the entitlement of a State other than the injured State to claim performance of the obligation of reparation in the interest of the injured State or other beneficiaries had been extended to reparation for serious breaches, if his interpretation of the amendment to article 48, paragraph 2 (b), which had replaced the previous wording with a reference to the "preceding articles", was correct.

30. As for the legal regime of countermeasures, the draft had struck the right balance between the use of countermeasures and the provision of appropriate safeguards against their misuse.

31. Although his delegation had some reservations with regard to the final text of the draft articles, overall it considered that the finalization of the text must be seen as a landmark in the codification and further development of international law, on which he congratulated the Commission and its last Special Rapporteur on State responsibility. On their adoption by the General Assembly, the articles would undoubtedly be a useful mechanism in improving international relations between States at both the bilateral and the multilateral level.

32. **Mr. Al-Baharna** (Bahrain) referring to chapter IV of the report, said that the draft articles on State responsibility made a significant contribution to the progressive development and codification of international law. With regard to the concept of serious breaches of obligations to the international community as a whole, he considered that its acceptance had been the price paid for the agreement to abandon the concept of international crimes, appearing in former article 19, which had been criticized by many Governments as being inconsistent with current State practice and jurisprudence. That had been a compromise, but subsequently the Commission had decided that the former paragraph 1 of draft article 42, which had dealt with damages reflecting the gravity of the breach, should be deleted and that the concept of serious breaches of obligations should be replaced by the concept of serious breaches of peremptory norms of international law.

33. Different views had been expressed within the Commission about the provisions concerning countermeasures. Some had considered that the concept was an undeniable part of international law, while others thought that the chapter on countermeasures should be deleted, inasmuch as the regime of countermeasures under customary international law was only partly developed. It had finally been decided to retain the chapter on countermeasures but to delete the previous article 54, which had dealt with countermeasures by States other than the injured State. On the other hand, the current article 54, which dealt only with lawful measures taken by States, had been reformulated in the form of a saving clause.

34. With regard to dispute settlement procedures, it had ultimately been decided merely to draw the General Assembly's attention to the dispute settlement mechanism in Part Three of the draft articles adopted on first reading. Should the General Assembly decide to elaborate a convention, therefore, it would have to decide what form provisions for dispute settlement would take. His delegation had been in favour of including such provisions in the draft articles, especially since the dispute settlement mechanism would effectively prevent any abuse of countermeasures. Failing that, he endorsed the Commission's recommendation to the General Assembly, but the draft articles would be incomplete unless they contained a dispute settlement procedure. The draft articles should take the form of an international convention, for the following reasons: first, like the 1969 Vienna Convention on the Law of Treaties, the principles of State responsibility, which comprised an important part of the structure of international law as a whole, deserved to be embodied in the solid and binding form of an international convention; and, secondly, codifying the rules of State responsibility in the form of a convention would ensure their stability, continuity, reliability and binding force.

35. Commenting on specific articles, he observed that in the new articles 40 and 41, the concept of a serious breach by a State of an essential obligation owed to the international community as a whole had been reformulated as "a serious breach by a State of an

obligation arising under a peremptory norm of general international law". Those articles were thus much weaker than the articles they replaced, in which the obligation had been defined as being essential for the protection of the fundamental interests of the international community. The removal from article 40, paragraph 2, of the phrase "risking substantial harm to the fundamental interests protected thereby", contained in the former article 41, diluted the effect of that paragraph and rendered the obligations under it incomplete. The new article 41 likewise watered down the stringent requirements of the former article 42, and did not provide for the payment of "damages reflecting the gravity of the breach", a provision which had appeared in paragraph 1 of the latter article. The result was to deprive the injured State of its entitlement to special damages reflecting the gravity of the breach. Since other consequences of a serious breach, spelt out in article 41, paragraphs 1 and 2, dealt only with the obligations of States other than the responsible or the injured State, no remedies were available to the injured State as a consequence of the serious breaches in question. He therefore preferred the former articles 41 and 42.

36. With regard to Part Two, chapter III, of the draft articles as a whole, he agreed with the remarks of the Special Rapporteur, in paragraph 49 of his fourth report, about the concept of peremptory norms of international law. Despite the Special Rapporteur's observation that only a few rules of international law could be considered peremptory, or give rise to obligations to the international community, the Commission had decided, in articles 40 and 41, to adopt the concept of peremptory norms in preference to the much more widely accepted principle of obligations owed to the international community as a whole.

37. With regard to Part Three, chapter I, of the draft articles, article 42 was a great improvement on its predecessor, the former article 43. It drew a clear distinction between the injured State to which the obligation breached was directly owed, and other States or the international community as a whole. However, it seemed to be unduly crowded with a number of provisions which could give rise to misunderstanding. In the new article 43, it would have been preferable to retain the title of the former article 44 (*Invocation of responsibility by an injured State*) because the act of giving notice of a claim should logically follow the act of invoking responsibility. That title would also be consistent with the title of article 48. In article 45, paragraph (b), the words "to be" should be omitted.

38. According to paragraph (2) of the commentary, article 48 was based on the principle that any State, other than an injured State, had the right to invoke the responsibility of another State if the obligation breached was owed to a group of States to which it belonged and was established to protect the collective interests of that group. Despite the ruling of the International Court of Justice in the *Barcelona Traction* case that "all States can be held to have a legal interest" in the performance of obligations towards the international community as a whole, article 48 did not mention the interest of the international community. He therefore suggested that the words "and is established for the protection of its collective interest" should be added at the end of paragraph 1 (b). In paragraph 2 (b), he supported the inclusion of the phrase "or of the beneficiaries of the obligation breached", which was in line with the provision in article 33, paragraph 2, extending the rights under Part Two of the draft "to any person or entity other than a State". In the *South-West Africa* cases, the International Court of Justice had found that the injury complained of was suffered by the people. Article 48, although controversial, was a useful and important provision. As stated in paragraph (12) of the commentary to that article, a claim made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached, involved a measure of progressive development.

39. He approved of Part Three, chapter II, which set out the necessary conditions for mitigating the harsh effects of countermeasures. Article 49, paragraph 2, used the term "non-performance" instead of "suspension of performance", which he preferred, and which had featured in the former article 50. However, the positive wording "to permit the resumption of performance" in paragraph 3 was preferable to the negative "not to prevent the resumption" in the latter article. Article 49, based on the finding by the International Court of Justice in the *Gabčikovo-Nagymaros Project* case that a countermeasure must be taken in response to a previous international wrongful act of another State, and must be directed against that State was broadly acceptable. So was article 50, which provided further guarantees and limitations on countermeasures and transferred the provision concerning the obligations of States taking

countermeasures in respect of the inviolability of diplomatic or consular agents from paragraph 1 to a more suitable place in paragraph 2. Article 51, based on the principle enunciated in the *Gabčikovo-Nagymaros Project* case that the effects of a countermeasure must be commensurate with the injury suffered, was well balanced. The procedural conditions laid down in article 52, paragraph 1, were consistent with general practice, as supported by the Tribunal in the *Air Services* arbitration. However, the provision in paragraph 2 allowing the injured State to "take such urgent countermeasures as are necessary to preserve its rights" was too broad and arbitrary, since it would be left to the injured State itself to define what was meant by urgent countermeasures. There was a risk of the injured State taking ordinary countermeasures and calling them "urgent", while complying with its obligations under the article to notify and offer to negotiate. Consequently, he could not accept paragraph 2 unless it was redrafted to spell out which urgent measures could be taken. The paragraph could be reformulated to read: "Notwithstanding paragraph 1 (b), the injured State may, on a temporary basis, take such urgent measures as freezing bank accounts and assets of the responsible State, as may be necessary to preserve its rights." In paragraph 3, the word "may" should be replaced by "shall", to make the provision stronger. As for paragraph 4, since the draft contained no separate dispute settlement procedure he suggested that the words "in accordance with the provisions of article 50, paragraph 2 (a)" should be added at the end of the paragraph. Article 53 provided a further safeguard against the indefinite continuation of countermeasures. It would be preferable to delete article 54, which might lead to confusion about the difference between "lawful measures" and countermeasures.

40. Articles 55 to 59 were generally acceptable. He welcomed especially article 58, confirming that the individual responsibility of State officials for crimes against international law was distinct from the issue of State responsibility. As explained in paragraph (3) of the commentary, that principle was currently reflected in article 25, paragraph 4, of the Statute of the International Criminal Court.

41. **Mr. Perez Giralda** (Spain), welcoming the conclusion of the Commission's work on the topic of State responsibility and the signal contribution of its Special Rapporteur, endorsed its recommendation (A/56/10, para. 72) that the General Assembly should in a resolution take note of the draft articles and annex the text of the articles to the resolution. International law should contain a binding instrument on State responsibility, even though the discussions in the Committee at its previous sessions had not produced a consensus for one. The Commission had now made a realistic proposal, and it could be anticipated that the practice of States and of the international courts would shape the rules governing the topic and enable States to negotiate their content, so that they could be made binding in future. The draft adopted on second reading was a means to that end, representing the minimum common denominator so far agreed among Governments. His own delegation was anxious to contribute to a consensus, even though some of the preferences it had so far expressed were not reflected in the current draft: for instance, there was no special regime of responsibility for the most serious breaches of international law, nor was there any dispute settlement mechanism, which was especially relevant to countermeasures.

42. Referring to chapter VI of the Commission's report, he welcomed the proposals of the Special Rapporteur on reservations to treaties, especially with regard to the functions of depositaries. There was no reason why the guidelines produced by the Commission should depart from the provisions of the Vienna Convention on the Law of Treaties, especially its article 77.

43. Turning to chapter VII, he expressed approval of the remarks of the Special Rapporteur in his second report on diplomatic protection, concerning the legal regime for the exhaustion of local remedies, which treated it as simply a requirement for the admissibility of international claims. Admittedly, that approach was not entirely consistent with the solution adopted in the draft on State responsibility, article 44 of which referred to the rule solely in the context of admissibility. As for the question of continuous nationality, he favoured retaining the traditional rule, with certain exceptions.

44. With regard to chapter VIII, he considered that the fourth report on unilateral acts of States was a valuable contribution to the examination of the topic, which was a difficult one, as evidenced by the frequent discussions in the Commission about the feasibility of codifying it and the problems which States seemed to have in identifying their practice in that area. It would

be desirable to concentrate on certain typical unilateral acts and the legal regime which should apply to each. The elements of interpretation which had to be brought to bear in determining whether an act or omission constituted a unilateral act would themselves play a role in its classification. That process should precede the process of interpreting the specific character of an act already identified as unilateral, but the content and scope of which were doubtful. He shared the inclination of the Special Rapporteur to adopt the rules of interpretation contained in the Vienna Convention on the Law of Treaties, which emphasized the intentions of States.

45. **Mr. Bliss** (Australia) said the completion of the Commission's work on State responsibility was a monumental achievement. Since the time when it began work on the topic, public international law had expanded beyond all expectation, yet its structure still rested on the key foundation of State responsibility, on which its continued development would also rely. The commentary to the new set of draft articles was clear and useful. While each of the Special Rapporteurs had made their contribution to the work, the contribution of the current Special Rapporteur, was outstanding and had enabled the Commission finally to adopt the draft articles and their accompanying commentary. The draft had also benefited from the comments by States on previous versions, resulting in a final text more acceptable to States than would otherwise be the case.

46. He welcomed the use in article 42 of the phrase "the international community as a whole", which was sufficiently broad to cover not only States, but also international organizations and other persons and entities. He was also pleased that the concept of an "integral obligation" which had figured in the earlier draft, had been replaced by the definition of a breach of an obligation found in paragraph (b) (ii) of that article. He likewise welcomed the definition of injury in article 31, paragraph 2, which included but was not limited to damage, thereby allowing for a range of potential types of damage.

47. He approved of the inclusion in the text of a countermeasures regime. Australia had argued that although it was important to ensure that countermeasures were not abused, the regime should not be unduly restrictive. Article 53, paragraph 4, provided an important caveat in that respect.

48. Article 10 had not been amended to reflect his country's concern that the link envisaged in the draft between the conduct of an insurrectional movement and the responsibility of a new State which emerged from such a movement was too open-ended. It would have been useful to have further clarification of the degree of proximity, or the time frame required, for the conduct of the movement to be considered an act of the new State.

49. He welcomed the Commission's work on defining the "injured State" and the "other State", and its amendments in article 48, paragraph (1) (a), to the term "collective interest". The overall balance of article 48 was satisfactory, but the phrase "beneficiaries of the obligation" in paragraph 2 (b) might create some uncertainty concerning the scope of that article in relation to the provision in article 54 for measures taken by States other than the injured State.

50. One delegation had noted that the draft articles were not perfect; however, any form that made them more acceptable from one perspective would inevitably have made them less so from another. Clearly, a process of accommodation and compromise had been required within the Commission, and the Committee should take a similarly constructive approach. He endorsed the recommendation that the General Assembly should take note of the draft articles in a resolution and annex them thereto (A/56/10, para. 72); the Assembly should also welcome their completion. Such a resolution, to the extent that it was neutral as to the content of the draft articles, should not be controversial and would be a fitting and timely acknowledgement of the Commission's major achievement.

51. However, he did not support the Commission's further recommendation that the Assembly should consider, at a later stage, the possibility of convening a conference with a view to concluding a convention on the topic. While that might be seen as a modest outcome after fifty years of work, his delegation believed that a diplomatic conference would inevitably lead to painstaking renegotiation of each article, whereas the adoption of a declaration would ensure the integrity of the draft articles and give them a universality of application unlikely to be achieved if an attempt were made to incorporate them into a convention. Such an approach would render the draft articles more, rather than less, relevant, persuasive and prominent and would not preclude international

tribunals from referring to them as, in fact, the International Court of Justice had already done. It would be preferable for the General Assembly to adopt a resolution that would enable it to return to the issue in 4 or 5 years' time, at which point it could consider whether any further action could be taken.

52. Lastly, he did not believe that the articles, whatever form they took, should contain a dispute settlement provision. If they were adopted as a non-binding code or declaration, there would be no need for such a provision, while if they were adopted as a treaty, the latter's application would be so broad that a general provision on compulsory dispute resolution could not be realistically concluded. Reliance should rather be placed on existing dispute settlement provisions, including application of the Optional Clause under the Statute of the International Court of Justice and recourse to other relevant tribunals, such as the compulsory jurisdiction of the International Tribunal for the Law of the Sea.

53. **Mr. Chik** (Singapore) said that the topics on the Commission's agenda took on even greater significance in the light of the destabilizing events of September 2001.

54. He welcomed the measures taken to simplify the language of the report by relegating explanations and detailed clarifications to the commentary, which would provide authoritative guidance in interpretation. The many cross-references to old and new legal materials and decisions of the International Court of Justice and the continued consultations with Governments and other organizations were a sign of mutual cooperation between law-making bodies that would lead to an increased codification and recognition of, and adherence to, international law.

55. With regard to chapter IV of the report, he congratulated the Commission and all the Special Rapporteurs and, in particular, Mr. James Crawford, on their milestone achievement on the important and sensitive topic of State responsibility. Their realistic expectations, and the acknowledgement that the Commission's work was part of the development of international law, had produced an instrument that would be acceptable to States. He endorsed deferment of the provisions on a dispute settlement mechanism, which were more suited to consideration in the context of a treaty, and the emphasis on peaceful settlement of disputes and on assurances and guarantees (article 30 (b)), which were valuable to the restoration and maintenance of good relations between States. The inclusive approach to a definition of injury would help to resolve problems associated with that elusive, shifting concept. Lastly, the approach to the controversial issue of countermeasures and, in particular, the saving clause for lawful measures taken by States other than an injured State, a matter not yet ripe for codification, were generally acceptable; the effort to avoid premature drafting in potentially destabilizing areas of law was laudable.

56. With reference to chapter V, he was pleased to note that the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities) focused on the practical issue of risk management as an aspect of prevention. The emphasis on good faith cooperation and consultation among States showed a sensitivity to the problems that many countries faced in controlling transboundary harm emanating from their territories and concentrated on problem-solving rather than finger-pointing. He thanked all the Special Rapporteurs and, in particular, Mr. Rao, for their work on the text.

57. Concerning chapter VI, the late formulation of reservations to treaties (draft guideline 2.3.1) was a relatively new practice developing out of the need of some States or organizations to change certain aspects of their rights and obligations in relation to a convention to which they were parties. His delegation did not believe that tolerance of the practice would lead to its abuse; late formulations would be made only in light of changed needs or circumstances or to remedy an oversight. The practice of requiring unanimous non-objection from parties notified of the reservation would deter flagrant or frequent late filings and would be preferable to forcing States to take the more drastic measure of denouncing the convention in question.

58. He could accept the use of the term "objections" — which in the Vienna Convention meant opposition to the content of a reservation — to mean opposition to the procedure of a reservation, but felt that use of an alternative term such as "rejection" or "refusal" might avoid confusion. Depositories should communicate late reservations, together with a notice of their lateness and a reference to draft guidelines 2.3.1 to 2.3.3; if there was no objection to the content or late formulation of the reservation within the stipulated period, it could be formally filed. He hoped

that States and organizations would not make objections routinely on the sole ground of late formulation.

59. **Mr. Westdickenberg** (Germany), commenting on chapter IV of the report, said that in the light of the remaining areas of controversy, it was all the more admirable that the Commission had succeeded in finalizing the draft articles on State responsibility. Many States were still in the process of analysing the draft; he therefore suggested that the topic of State responsibility should be placed on the agenda of the General Assembly at its fifty-seventh session and that interested States should be invited to communicate their views.

60. He was glad that the term "international crimes", which would have created unwarranted confusion between States' responsibility to provide restitution or reparation and individuals' personal responsibility for their actions, had been replaced by "serious breaches of obligations under peremptory norms of general international law". The prohibition of torture and aggression, and the basic rules of international humanitarian law, mentioned in the commentary, were rules of paramount importance that merited the special treatment afforded them in articles 40 and 41. He also welcomed deletion of the suggestion that the gravity of the breach should be reflected in the damages due; that notion might have led to the awarding of punitive damages, which were alien to the purpose of reparation. It would be preferable if the rules were to become an annex to a General Assembly resolution rather than an international convention in order to ensure their broadest possible acceptance and avoid the danger of unravelling the text.

61. With regard to chapter V, transboundary pollution was not a new problem; however, with the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, the Commission had entered uncharted territory, since international liability had traditionally been based on the wrongfulness of an act or conduct under international law. The implications of the new rules were potentially very broad and it would be difficult to achieve an equitable balance of interests; it would therefore be necessary to continue discussion of the draft on the broadest possible basis in order to ensure that all relevant interests were adequately taken into account.

62. In relation to chapter VI, he noted that the exclusion of reservations to a multilateral treaty was invariably aimed at preserving the integrity of the instrument, perceived as an indivisible whole; while that approach could be somewhat inflexible, it could also ensure the integrity of a complicated system of rules and values, particularly in fields such as human rights, where the international community's commitment to universality and indivisibility should not be eroded. The recent trend towards reservations that subjected a treaty system as a whole to another system of norms and values which was considered superior in rank by the State making the reservation tended to deprive a multilateral convention of much of its value, which, after all, consisted in defining common standards. A way must be found to reconcile national legal systems with obligations under international law.

63. Concerning chapter VII, he commended the open-mindedness with which the Special Rapporteur on Diplomatic Protection had addressed possible new solutions to an old problem. There were good reasons, rooted in both doctrine and practice, for the old rule that if a person suffered an injury through a foreign State's breach of international law and subsequently changed his citizenship, only the State whose nationality he had held at the time of the injury was entitled to exercise diplomatic protection; that rule allowed the State in question to assert its own rights and prevented "protector shopping" by injured individuals. However, there were cases where application of that rule might lead to unwarranted hardship, such as those involving an involuntary loss of nationality through State succession, marriage or adoption.

64. The Special Rapporteur and the Commission should also be commended on their treatment of the exhaustion of local remedies; the guiding criterion for "remedy" in that context should be that it was sufficient and available to everybody, thereby excluding purely discretionary remedies. It did not matter whether the authority from which the individual expected a ruling was judicial or administrative. Local remedies applied only in the case of claims made by a State because one of its nationals had been injured rather than in pursuit of reparation for an injury done to the State itself; making that distinction would be a difficult, but not an impossible, task.

65. With reference to chapter VIII, he felt that in the light of the vast variety of possible unilateral acts of States, international law might best be served by listing the more-frequently-encountered such acts and the rules by which they were governed.

Statement by the President of the International Court of Justice

66. **Mr. Guillaume** (President of the International Court of Justice) said that the situation with regard to the proliferation of international judicial bodies and its impact on international law had not improved since the previous year and indeed, as the swordfish stocks dispute between Chile and the European Union and the Southern Bluefin Tuna cases had shown, the risks of "forum shopping" had become worse.

67. The risks of conflicting case law had also grown and the Court had just been seized of an application by Liechtenstein instituting proceedings against Germany in respect of a case, certain aspects of which had been heard and decided by the European Court of Human Rights.

68. The proliferation of international judicial bodies could endanger the unity of international law. International lawmakers and judges should exercise great caution in that field in the future, although such caution might not suffice and procedures would have to be established to enable the Court to rule on questions submitted to it for a preliminary ruling by specialized international courts.

69. On 16 March 2001 the Court had decided a territorial dispute between Qatar and Bahrain concerning sovereignty over certain islands and the maritime delimitation to be established between the two States.

70. Delimitation of maritime areas had long been considered a secondary question involving the fixing of the boundaries between narrow territorial areas. In the past 30 years, however, it had become one of the main territorial issues, owing to technological developments and the extension of State jurisdiction to the high seas.

71. In making such delimitations, two methods had been recommended. Some had looked to the "equidistance method", pursuant to which the maritime boundary between States must follow the median line every point of which was equidistant from the nearest points on the coasts. Others had pointed out that, while the equidistance method was acceptable for the delimitation of the territorial seas between States with opposite coasts which were comparable in length, it could yield inequitable results in other circumstances. Accordingly, they had advocated maritime delimitations based on equitable principles or producing equitable results.

72. The boundary between the territorial sea and the high seas had traditionally been fixed at three nautical miles from the coasts (currently often increased to 12 nautical miles). The question, however, was which coasts should be taken into account in fixing the boundary in order to ensure appropriate delimitation. There were two methods for identifying the starting-points of the territorial sea: the normal baseline method and the straight baseline method.

73. The normal baseline ordinarily used for measuring the breadth of the territorial sea was the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State. Nevertheless, the Court, in its Judgment of 18 December 1951 in the *Anglo-Norwegian Fisheries* case, had preferred the straight baseline method to the traditional one. While noting that the normal baseline method could be applied without difficulty to an ordinary coast which was not too jagged, the Court had added that where a coast was deeply indented and cut into or was bordered by an archipelago, the baseline became independent of the low-water mark and could only be determined by means of a geometrical construction. For those situations the Court had adopted the straight baseline method, which had later been incorporated into the 1958 Convention on the Territorial Sea and the Contiguous Zone and then into article 7, paragraph 1, of the United Nations Convention on the Law of the Sea. In its Judgment of 16 March 2001, the Court had had its first opportunity to apply those provisions, which it deemed to be part of customary law.

74. Bahrain had contended that the various maritime features lying off the coast of its main islands could be regarded as similar to a fringe of islands constituting a whole with the mainland. It had concluded that it was entitled to draw straight baselines connecting those features.

75. The Court had disagreed with Bahrain on that point. While recognizing that the maritime features in question were part of Bahrain's overall geographical

configuration, it had observed that they were not part of a deeply indented coast, that they could not be characterized as a fringe of islands, and that the situation was therefore different from the one described in the United Nations Convention on the Law of the Sea. It had concluded that Bahrain was not entitled to draw straight baselines and that, accordingly, the equidistance line between Bahrain and Qatar must be drawn by reference to normal baselines. Bahrain's internal waters had been reduced accordingly.

76. In addition to clarifying the rules for fixing the external limits of territorial seas, the Judgment also addressed the question of the delimitation of the territorial waters of neighbouring States. That question was governed by customary law as codified by the Geneva Conventions and the United Nations Convention on the Law of the Sea. Article 15 of that Convention established the principle that territorial seas must be delimited in accordance with the equidistance method, but added that the equidistance provision did not apply where special circumstances made it necessary to delimit the territorial seas of the two States in a different way.

77. In the case between Qatar and Bahrain, the Court, confirming its case law, had refused to apply the method of mainland-to-mainland calculation in drawing the equidistance line. It had identified each of the maritime features having an effect upon the course of the equidistance line and had fixed that line by reference to the appropriate baselines and basepoints. To that end, it had identified the islands and islets under the sovereignty of each of the States.

78. A new difficulty had arisen, however, as a result of the presence in the area of low-tide elevations. As defined by the United Nations Convention on the Law of the Sea, a low-tide elevation was a naturally formed area of land which was surrounded by and above water at low tide, but submerged at high tide. Pursuant to the Convention, where a low-tide elevation was situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation might be used as the baseline for measuring the breadth of the territorial sea. Where a low-tide elevation was wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it had no territorial sea of its own.

79. In the case between Qatar and Bahrain, certain low-tide elevations were situated in the area where the territorial seas of the two States overlapped. In principle, therefore, each of them had a right to use the low-water line of those low-tide elevations for measuring the breadth of its territorial sea. For the purposes of delimitation, the competing rights of the two States had appeared to cancel each other out. Nevertheless, Bahrain had contended that it had taken possession of the majority of the low-tide elevations, which had thus come under its sovereignty, and that it alone was permitted to take them into account for purposes of fixing the equidistance line.

80. The Court had not accepted that argument. It had held that a State could not acquire sovereignty by appropriation over a low-tide elevation situated within the limits of its territorial sea where the same low-tide elevation was also situated within the limits of the territorial sea of another State. Accordingly, it had concluded that those low-tide elevations could not be used for determining the basepoints and drawing equidistance lines.

81. With regard to the delimitation of the continental shelf and the exclusive economic zone, the Court had also established a case law which was now authoritative. In the *North Sea Continental Shelf* case (1969), the Court had initially inclined towards a delimitation of that shelf in accordance with equitable principles, taking account of all the relevant circumstances. The same approach had been adopted in subsequent cases. Those decisions had influenced the solution adopted by the United Nations Conference on the Law of the Sea, as reflected in articles 74 and 83 of the United Nations Convention. At that stage, however, case law and treaty law had become unpredictable, prompting the Court to develop its case law in the direction of greater certainty.

82. A new stage had been reached in the Judgment rendered on 14 June 1993 in the case between Denmark and Norway concerning the maritime delimitation in the area between Greenland and Jan Mayen. In that case it had been proposed to delimit the continental shelf in accordance with the 1958 Geneva Convention on the Continental Shelf (equidistance/special circumstances) and the fishing zones in accordance with customary law (equitable solution, having regard to relevant factors). The Court had stressed that, in both cases, an equitable result must be reached. To that end, it had held that it was appropriate to start from the

equidistance line, subsequently making all the necessary corrections to it, having regard to the relevant factors. Lastly, it had stated that those factors were comparable to the special circumstances envisaged by the 1958 Convention. On that basis, the Court had arrived at a single delimitation line for the continental shelf and the fishing zone, and had drawn that line to the east of the median line.

83. The solution arrived at in the case between Denmark and Norway had been applicable from then on with regard to the delimitation of the continental shelf and the fishing zones of States with opposite coasts. It had remained to be seen whether the same would apply in the case of adjacent coasts.

84. The Court had ruled affirmatively on the matter in the case between Qatar and Bahrain, again deciding that an equidistance line should first be provisionally drawn, consideration then be given to whether there were relevant circumstances leading to an adjustment of that line. In the event, it had ruled out a number of circumstances invoked by the parties and had retained only one, concerning a maritime feature known as Fasht al Jarim, which constituted a projection of Bahrain's coastline in the Gulf area. The Court had decided that, given the circumstances of the case, equity required that Fasht al Jarim should have no effect in determining the boundary line.

85. It was encouraging to note that the law of maritime delimitations, by means of the developments in the Court's case law which he had described, had reached a new level of unity and certainty, while maintaining the necessary flexibility. In all cases the Court must, as States also did, first determine provisionally the equidistance line and then ask whether there were special circumstances requiring that line to be adjusted with a view to achieving equitable results. In the case between Qatar and Bahrain, the parties had thanked the Court for managing to reconcile law and equity.

The meeting rose at 1 p.m.

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Chairman: Mr. Lelong ..... (Haiti)

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Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*)

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01-61331 (E)

The meeting was called to order at 3.15 p.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10 and Corr.1)

1. **Mr. Winkler** (Austria) said that he welcomed the International Law Commission's adoption of the draft articles on State responsibility and the Commission's recommendation to the General Assembly with respect to those articles (A/56/10, paras. 72 and 73).

2. The Austrian delegation fully supported the approach recommended by the Commission. It reiterated that the draft articles should be adopted as part of a resolution so that they would become a non-binding legal instrument, without excluding the possibility of convening an international conference for the conclusion of a convention on the subject at a later stage. Moreover, the adoption of the draft articles as an annex to a General Assembly resolution would make it possible to test the articles' adequacy in the light of State practice. If an international conference was convened, its work could usefully be based on the experience thus acquired; if not, the articles could, to the extent that they were accepted in State practice, serve as a code of conduct on State responsibility.

3. Recent events had shown that State responsibility was a very sensitive subject and, together with the principles of the non-use of force and non-intervention, to which it was closely related, perhaps the most politically charged area of international law. A code of conduct was the best means of consolidating the law of State responsibility, even if that meant, in the short term, that deviations might occur and might have to be tolerated.

4. In addition to stating rules in writing, a code of conduct had an educational function in that it could help to consolidate *opinio juris* in respect of rules that codified custom. It was also a useful tool for the progressive development of law, as shown by the manner in which various branches of international law had developed.

5. His delegation believed that, in the long term, the perceived fairness of the code would lead to its acceptance and then to an adjustment of the conduct referred to in the draft articles on State responsibility for internationally wrongful acts. At the current stage, the General Assembly and the international community should seek to convince States that well-defined rules were in the interest of both the victims of violations and the alleged wrongdoers, since the draft articles endeavoured to strike a balance between the legitimate interest of victims of wrongful acts in pursuing their rights and the equally legitimate interest of alleged wrongdoers in being protected against abuse or excessive or humiliating demands.

6. Noting that some delegations regretted the lack of provisions on the peaceful settlement of disputes, Austria felt that the omission was necessary in view of the proposal to annex the text to a resolution.

7. With respect to the prevention of transboundary harm from hazardous activities, the Commission's adoption of draft articles on the issue was a major step forward in the elaboration of international law in that area. Austria had always given priority to the codification and progressive development of international law on the prevention of transboundary harm. He recalled that Austria and the European Community had made many proposals in that regard and that the prevention of harm was one of the most important aspects of action to achieve sustainable development.

8. The draft articles were of fundamental importance to the international community. Austria strongly supported the International Law Commission's recommendation on the elaboration of a convention, and was convinced that such a convention could be adopted within a relatively short period. Austria was satisfied with the text as a whole and hoped that the General Assembly would follow the Commission's recommendation, but nonetheless wished to comment on some of the draft articles.

9. With regard to article 1 (Scope), he questioned the relevance of the phrase "not prohibited by international law", since activities prohibited by international law fell within the scope of other rules of international law. The relationship between article 3 and article 10, which listed the factors determining whether an activity was to be permitted or not, needed clarification. It might be wondered how those factors should be taken into consideration under article 3 to determine whether a State had fulfilled its obligations under that provision. His delegation further considered that the wording of article 5 should bring out more clearly the obligation of States to take the necessary measures without undue delay. It supported the ideas

expressed in articles 9 and 10 and regarded the obligation of States concerned to enter into "consultations on preventive measures" and to take into consideration "factors involved in an equitable balance of interests" as essential for preventing transboundary harm as far as possible. Article 9, paragraph 3 contained an important provision for achieving the goal of sustainable development. The commentary on article 18 ("Relationship to other rules of international law") specified that the obligation incurred by States under that article was intended to extend both to rules having a particular application and to rules which were universal or general in scope. The effects of such a provision on the application of the draft articles would have to be thoroughly examined; Austria remained open to any discussion of article 18.

10. On the subject of chapter VI, concerning reservations to treaties, his delegation considered that draft guideline 2.2.3 (Reservations formulated upon signature when a treaty expressly so provides) aimed at constituting an exception to the general rule contained in guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty); it questioned the solidity of State practice regarding confirmation of reservations and how those confirmations were interpreted. Recalling the wording of guidelines 2.3.1 (Late formulation of a reservation) and 2.3.2 (Acceptance of late formulation of a reservation), his delegation was very concerned that such guidelines would have the effect of making the whole regime of treaty reservations also applicable to so-called late reservations, which did not fall under the definition of reservations as reflected in article 19 of the Vienna Convention on the Law of Treaties. The International Law Commission had itself defined reservations with the clear intention of not deviating from the Vienna Convention, and the definition it gave contained a clear reference to the point in time when a reservation could be made and made no provision for the case of "late" reservations. The consequence was that, even if it were called a "reservation", a late reservation constituted in reality a different kind of declaration from true reservations and should be kept apart from them. Of course, the States parties to a given treaty would always have the possibility of agreeing to apply the regime of reservations to "late" reservations in respect of that treaty, but a declaration not consistent with the definition of reservation in the strict sense should not be considered as a reservation. The approach suggested in the draft guidelines could compromise the basic principle of *pacta sunt servanda*, and the application of a regime of "late reservations" would result in the creation of a system of amendments to treaties which would be contrary to the rules set out in articles 39 to 41 of the Vienna Convention.

11. His delegation also wondered whether the draft guidelines on interpretative declarations were in conformity with article 31 of the Vienna Convention. Moreover, the concept of conditional interpretative declarations seemed rather vague and his delegation doubted the utility of giving it separate treatment. A conditional interpretative declaration had effects very similar to those of a reservation and when formulated by a State could call in question its commitment to the treaty in question. His delegation did not wish to encourage recourse to such declarations as "interpretative declarations" but was ready to contribute to clarification of the concept if dealt with in the area of reservations.

12. He concluded by referring to the International Law Commission's decision to appoint two Special Rapporteurs on two of the five topics included in its long-term programme of work. Although that marked Austria's particular interest in the question of responsibility of international organizations and the issue of shared natural resources, his delegation nevertheless asked the Commission to clarify their content.

13. **Mr. Leanza** (Italy) noted that the most important amendments to the earlier draft articles tended to improve the structure of the draft and clarify some basic criteria, such as *ultra vires* conduct. The clarifications made to chapter V (Circumstances precluding wrongfulness), although they were drafting changes, were very timely. Particular mention might be made of article 25, paragraph 1 (b), where the expression "international community of States as a whole" had been replaced by "international community as a whole", in order to draw a distinction between the community of States to which the Vienna Convention referred, taking States as bodies which played a role in establishing international legal norms, and the international community as a group of bodies which were not exclusively States.

14. His delegation reaffirmed its position vis-à-vis the concept of the responsibility of States for wrongful acts and the distinction between international crimes and international delicts. Customary international law

already provided that the breaching of certain obligations established to protect the interests of the international community was a direct infringement of the subjective rights of all States and gave them the right to invoke the responsibility of the State which had breached obligations which the International Court of Justice termed obligations *erga omnes*. Since it was necessary and very important to adopt the draft articles *in toto*, his delegation had accepted the compromise proposed by the Commission to delete the term "crime" and to keep the essentials of a specific set of regulations, while it did not contest the new definition of serious violations appearing in article 40. However, the complex distinction between obligations *erga omnes*, peremptory norms and international crimes committed by the State must be brought out, since in adopting the new wording of article 40, the Commission seemed to be extending the category of serious wrongful acts compared with that comprising international crimes.

15. Recalling the two criteria that enabled serious breaches of obligations to be distinguished from other types of breaches (namely, the character of the obligation breached and the intensity of the breach), he emphasized the impreciseness of the wording proposed by the Commission in relation to the notions of peremptory norm of general international law and intensity of the breach. The Vienna Convention on the Law of Treaties contained a tautological definition of peremptory law, which doctrine and jurisprudence had endeavoured to interpret as being a framework of rules prohibiting conduct judged intolerable because of the threat it posed to the survival of States and peoples and to basic human values. On the basis of that general definition, rules prohibiting aggression, torture, slavery, genocide and apartheid, inter alia, had been considered peremptory. The intensity of the breach had to be evaluated in the light of the concepts of flagrant or systematic breach of an international obligation arising out of a peremptory norm. That evaluation could, however, give rise to differences capable of complicating the application of article 40.

16. His delegation regarded the provisions of article 41 (Particular consequences of a serious breach of an obligation under this chapter) as generally acceptable, even though they were in the nature of a *compromis* and had to be defined case by case, according to the circumstances. The obligations referred to in article 41 were obligations *erga omnes* and would apply, where appropriate, to all members of the international community.

17. The Italian Government fully supported the changes made by the Commission to Part Three, chapter I, of the draft articles (Invocation of the responsibility of a State) and endorsed the Commission's decision to eliminate, in chapter II, the distinction between countermeasures and provisional countermeasures. The wording of article 54 (Measures taken by States other than an injured State) was acceptable because it provided for the surmounting of differences with respect to measures which a State other than an injured State could take against the State responsible for the wrongful act. Italy had no objection to the inclusion of a saving clause, even if it enlarged the scope of the provision.

18. His Government was not in favour of transforming the draft articles into an international convention, as to do so would require inter-State negotiations and would delay or even prejudice the adoption of the text. A non-binding instrument would be preferable, and the General Assembly could adopt a resolution drawing States' attention to the draft articles. By approving the draft, a State would not, however, be signifying a conviction that all the rules therein conformed to customary international law, and the way would remain open to a subsequent consideration of controversial issues.

19. **Mr. Dinstein** (Israel) said that he shared the opinion of the Special Rapporteur and the International Law Commission that the General Assembly should take note of the draft articles on State responsibility and annex them to its resolution. The final text should be widely disseminated in order to go through the crucible of international theory and practice and to receive the imprimatur of scholars and courts before a diplomatic conference was convened to transform it into a treaty.

20. The draft articles were largely the mirror image of customary international law but had the merit of sharpening the picture. Unfortunately, a number of the provisions limited themselves to the rudiments of the law applicable, regardless of the maxim "the Devil is in the details". In some instances, the Commission was studying the details in question, as in the case of nationality of claims and exhaustion of local remedies mentioned in article 44. Where the missing details were not to be the subject of further codification, they could

emerge from ongoing practice. That was true of article 36, which did not determine the international standard of compensation, and article 38, which did not address the issue of the proper interest rate adjusted for inflation.

21. His delegation, which had already expressed its concern with regard to certain provisions, regretted that the draft articles did not shed light on the controversial scope of *jus cogens* or on the ambit of obligations *erga omnes*. Even though the commentary dealt in greater detail with the question of definitions, his delegation was not convinced, unlike the Special Rapporteur, that *jus cogens* coincided with the norms listed by the latter. In the legal literature, there was a tendency to spread the wings of *jus cogens* to an ever-growing list of rules of international law, and it was perhaps time to consider to what extent any such enumeration was justified. Clearly, when the bounds of *jus cogens* were in question, the overall reference to automatic consequences of serious breaches might prove impracticable. Consequences deemed natural in the case of, say, genocide, might prove totally inappropriate if *jus cogens* was stretched too far. As stated by the representative of Finland on behalf of the Nordic States, having a dual regime of consequences, in the case of serious breaches of *jus cogens* on the one hand and obligations *erga omnes* on the other, might lead to abuse and was not reflected in customary international law. The explanation for the problems perhaps lay in the fact that the text of the draft articles still carried scars from the battle over "crimes" and "delicts".

22. Since the draft articles were not crafted as a treaty, the decision not to provide for dispute settlement mechanisms was welcome. The law of State responsibility consisted of secondary rules that, in one way or another, had an impact on the primary rules of international law. If dispute settlement mechanisms were to apply in all disputes arising where State responsibility was at issue, they might have the effect of providing a blanket cover for almost all inter-State disputes, and the majority of States would not be ready to accept such a revolutionary change. It would be better, and certainly more prudent, to leave the matter of compulsory dispute settlement to be addressed separately and specifically in each instrument setting out primary rules governing a particular aspect of international law.

23. **Mr. Fomba** (Mali) noted that the question of State responsibility was central to international law and said that the draft articles basically attempted to better reflect the principle of the universality of international law and the legal equality of States, to promote increased visibility of the international community as an active force, to proclaim the principle of the moralization of State conduct and the need to halt abuses linked to States' political and economic inequality, and to better crystallize the socializing and pacifying function of international law. The text, which had taken over 40 years to draft, had undoubtedly benefited from expertise and knowledge of exceptional quality, but important issues still posed difficulties.

24. With regard to the question of serious breaches of obligations to the international community as a whole, his delegation found the topic promising, insofar as it was based on the premise that the international community constituted an influential force and that its survival and enrichment required respect for norms so fundamental that there should be no departure from them. His delegation noted the ILC common position that the chapter should be retained on two conditions: article 42, paragraph 1, concerning damages reflecting the gravity of the breach, would be deleted and the phrase "an obligation owed to the international community as a whole and essential for the protection of its fundamental interests" would be replaced by the words "peremptory norms". In that connection, the Malian delegation supported the basic idea underlying chapter III and was in favour of maintaining it. It believed that the deletion of article 42, paragraph 1, was appropriate, inasmuch as its retention created more difficulties than it would resolve, endorsed the arguments adduced in support of the preference for the concept of peremptory norms despite its problematic content and expressed reservations about the minor character of certain breaches of those norms. With regard to the further consideration of certain aspects of the consequences of serious breaches, his delegation basically considered that the existing wording of article 41 was acceptable on the whole, but that certain aspects should be clarified, such as the obligation not to "render aid or assistance" or the scope of the term "further consequences", provided that the text remained within the limits of what was reasonable and emphasized the result much more than the means, without prejudice to the advisability of specifying procedural rules of behaviour subsequently, for example in an annexed document or a protocol. On the

issue of limiting the sphere of application to situations actually covered by the chapter, the existing version of the text did not seem to give rise to any particular concern. Articles 41, 48 and 54 should be brought more closely into line.

25. Without questioning the right to resort to countermeasures, his delegation believed that their use should be accompanied by necessary and sufficient guarantees to limit abuse. It noted that, during the consideration of that question, ILC had been divided into three groups: those who advocated maintaining the chapter as it stood, those who wanted the chapter to be improved and those who favoured simply deleting it. The Malian delegation had not, however, had time to consider in depth the arguments advanced in support of the various positions. The question of countermeasures taken by States other than an injured State (article 54) had also divided ILC. In that regard, the Commission's conclusions essentially amounted to alterations or realterations of a technical nature which did not seem to pose any special difficulty.

26. With regard to the overall configuration of chapter II, the Malian delegation welcomed the fact that the function of countermeasures was presented in terms of an inducement to respect the primary obligation and not from the punitive viewpoint. The limitations of the scope *ratione temporis* and *ratione materiae* of countermeasures, as envisaged in articles 49 and 50, appeared at first sight to be sufficiently important to provide good protection against inherent dangers if efforts were made to respect the hard core of international law. The principle of proportionality played an important role in the balanced regulation of relationships of force and therefore of relationships of cause and effect. The gradual procedural precautions provided for in article 2 were part of the systematic effort to achieve pacification in relationships of force. However, urgent countermeasures needed to preserve the rights of an injured State should be truly protective in character. In addition, the suspension of countermeasures without undue delay in the event that the wrongful act had ceased or the dispute was pending before a compulsory settlement body was a logical consequence of the very function of countermeasures. The exception of non-implementation in good faith of dispute settlement procedures seemed to be obvious. The rule of automatic termination of countermeasures as soon as the responsible State had complied with its obligations (article 53) required greater vigilance and a strong sense of responsibility on the part of States, especially powerful ones.

27. With regard to the question of dispute settlement provisions, his delegation was receptive to the arguments developed in paragraph 57 of the report under consideration by the proponents of that theory. The existing text of articles 50 and 52 was contrary to neither the spirit nor the letter of Article 33 of the Charter, inasmuch as it proposed a mainly optional and gradual procedural system. However, his delegation appreciated the wisdom of the approach whereby ILC would refer the matter to the General Assembly and draw attention to the dispute settlement machinery which it had evolved in 1996 and which offered practical advantages. There were three options with regard to the question of responsibility: maintenance of the status quo — in other words, reference to customary international law; formal restatement of the essence of that law; and the proposal to create *sui generis* machinery along the lines of the 1996 machinery. His delegation had no definite position on the question at that stage.

28. In principle, the draft articles should take the form of a convention or, failing that, the recommendation of the Commission for a two-stage process should be implemented; that would entail, first, taking note of the draft articles in a resolution and annexing the text to the resolution — a procedure that had the practical advantage of allowing time for States, particularly small States, to better evaluate the draft articles, which were vital for the peaceful regulation of international relations and the democratization of international law, provided that that did not serve as a pretext for abandoning the initiative — then, considering the convening of an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention and dealing, at the same time, with the issue of the settlement of disputes.

29. He broadly shared the concerns expressed by the representative of Morocco, particularly with respect to the political choices underlying the draft articles. His delegation remained open to the proposal concerning the establishment of an ad hoc committee or a working group to complete the process by making the final political decisions.

30. **Mr. Czapliński** (Poland) said, with regard to State responsibility, that the draft articles constituted a

well-balanced compromise and that it would be extremely difficult to introduce amendments that could be accepted by all States. Moreover, the saving clauses included in the draft articles left sufficient room for manoeuvre for the States concerned involved in specific international legal disputes. The scholarly and exhaustive commentary to the draft articles provided answers to the many questions posed by the articles.

31. His delegation nevertheless wished to raise a certain number of problems. Thus, the issue of the attribution to a State of acts of non-State entities, as set out in articles 5 and 9, was not sufficiently clear. The notions of control, direction and instructions, as used in chapter II, should be clarified in the commentary. Likewise, his delegation would welcome the clear enunciation of the responsibility of States for the activities of parastatal organizations or agencies, which would enable the responsibility of de facto regimes to be engaged under international law.

32. His delegation was not entirely convinced that the distinction made in articles 24 and 25, respectively, between distress and necessity was really justified and should be included in the draft articles. Those two situations were in fact very similar, and distinguishing between them opened the way to casuistic regulation. The same was true of article 38 on interest. If article 24 should be maintained, his delegation found it rather lacking in consequence. The value it protected was human life, deemed one of the core human rights, the protection of which was often considered to be the peremptory norm of international law par excellence, as the International Court of Justice had pointed out in the Case concerning *United States Diplomatic and Consular Staff in Tehran*. In the great majority of cases, the State acting in a situation of distress would do so in the circumstances envisaged in article 24, paragraph 2. His delegation therefore considered it inappropriate to exclude the possibility for a State of invoking the necessity of protecting human life if the dangerous situation was due to its own conduct. The conduct of the State concerned should rather be seen as conforming to the fundamental norm of international law and, therefore, as precluding the wrongfulness of the act, notwithstanding the circumstances.

33. His delegation was also somewhat surprised that the commentary to article 24 referred to acts that were usually committed by private actors (like commanders of ships or aircraft, for example) but attributed those acts to the State concerned. The reference, in that context, to article 14 of the 1958 Convention on the Territorial Sea and the Contiguous Zone was hardly appropriate. Logically, a similar argument could be made against the corresponding provision of article 25, paragraph 2 (b).

34. In addition, although his delegation supported the idea of introducing in the draft articles the notion of serious breaches of peremptory norms of general international law, it was not fully satisfied with the proposed article. First, it did not see why the serious breaches should be limited to peremptory norms of international law. It seemed to his delegation that there was no general agreement as to the nature and scope of those norms and that, contrary to what was stated in paragraph 5 of the commentary to article 26, there was no convincing practice in international law of accepting *jus cogens*. Second, there were numerous norms of international law (like humanitarian norms or diplomatic law) which had never been put forward as peremptory norms, but which were of fundamental importance for the international community and deserved to be adequately protected. Third, the consequences of a breach of the peremptory norms, as proposed in article 41, corresponded to the effects of a violation of any norm of international law; they were not therefore limited to serious breaches of peremptory norms. Fourth, his delegation could see little justification for the distinction between serious breaches and regular breaches of peremptory norms proposed by the Commission, particularly since article 53 of the Vienna Convention on the Law of Treaties provided a treaty was void if it conflicted with a peremptory norm, notwithstanding the gravity or degree of the conflict. The distinction proposed was not supported by the current practice of international law. Lastly, his delegation did not see a clear link between article 41, on the one hand, and articles 48 and 54, on the other; article 48 seemed to refer to obligations *erga omnes*, since it recognized the right of any State to invoke the responsibility of the author of a violation of international law (thus establishing a procedural right, rather than a substantive one), and peremptory norms and obligations *erga omnes* seemed to belong to different categories (although they were not mutually exclusive).

35. With regard to draft article 50 he had certain difficulties which the commentary did not resolve fully; he wondered, for instance, whether the examples used in paragraph 1 (a), (b) and (c) were to be regarded

as examples of peremptory norms. If so, the international obligations set out in subparagraph (c) differed from the obligations set out in subparagraphs (a) and (b), because doctrine had largely confirmed the latter's classification as *jus cogens*. The inclusion of obligations of a humanitarian nature in paragraph 1 enlarged the scope of peremptory norms to include norms of a fundamental nature for the international legal order that had not previously been classified as peremptory. If that was the case, subparagraph (d) was to be regarded as corresponding mainly to the notion of *jus cogens superveniens* under article 64 of the 1969 Vienna Convention on the Law of Treaties. The question also arose as to whether the expression "general international law", as used in subparagraph (d), suggested the exclusively customary nature of peremptory norms, which would be consistent with doctrine. If that was not the case, his delegation proposed that the word "general" should be omitted in subparagraph (d).

36. His delegation supported the recommendation that the General Assembly should take note of the draft articles and annex them to a resolution, on the understanding that that would be a first step towards the adoption of a binding instrument.

37. **Mr. Subedi** (Nepal) said that it was the first time that his delegation had taken the floor before the Committee and it was doing so at a time when constantly unfolding events, whether terrorist or otherwise, called for a new and systematic approach to international law-making in order to achieve international cooperation for the progress of humanity and civilization. History appeared to be repeating itself, and that made the reasons for which the International Law Commission had been established 50 years earlier more valid than ever.

38. The objective of international law should be to promote justice, not only among nations but also across generations. It was therefore necessary to ensure its development, not only in traditional areas of international activity, but also in modern and evolving areas of activity; for example, in the joint management of shared natural resources and information technology. The ever-increasing use of information technology, particularly as a primary vehicle of globalization, and the absence of a global treaty to regulate it should encourage the Commission to give serious consideration to including it as a potential subject of study.

39. There was a well-developed body of law dealing with both living and non-living marine resources. Water itself was a natural resource and the very significant Convention on the Law of the Non-navigational Uses of International Watercourses had been adopted in 1997. However, there were other activities relating to water that were not covered by the Convention. There were also a number of shared natural resources about which the law was insufficiently developed. For example, the ever-expanding activities relating to the exploration and exploitation of such resources, which would be subject to increasing competition, since they would have to satisfy the needs of present and future generations. The Commission could play a very effective role in such areas.

40. With regard to the report of the Commission and the question of State responsibility, he favoured the adoption by the General Assembly of a resolution on the draft articles that would lead to a diplomatic conference in order to adopt a legally-binding global treaty.

41. However, returning to draft articles 40 and 41, which referred to "serious" breaches of obligations *erga omnes*, although the Commission had specified what it meant by "serious" in that context in article 40, paragraph (2), the qualitative distinction that it had made might give rise to some controversy when the articles were applied. Since there could be no derogation from the principles of *jus cogens*, his delegation wished to study the distinction made by the Commission more carefully.

42. The same was true of the provisions relating to countermeasures in chapter II of part three. Although the Commission had been very careful when defining the conditions and limitations of the countermeasures permissible under the proposed draft articles, his delegation would like to examine those provisions in the light of Article 33 of the Charter of the United Nations and other doctrines concerning the settlement of disputes, whether large or small, between States. It was precisely because the mission of the United Nations was to create an international society based on the rule of law that his delegation wished to examine the role countermeasures should play in a world which already had so many dispute settlement mechanisms, and to what extent it should be prepared to accept the notion of countermeasures, no matter how limited the scope under the proposed draft articles.

43. With regard to the recommendations of the Commission on the elaboration of a convention by the General Assembly based on the draft articles on prevention of transboundary harm from hazardous activities, his delegation considered that a working group of the Sixth Committee should be established to examine the draft articles more closely. The area under consideration touched on a vast range of issues covered by a number of international treaties and international organizations. The Commission was to be congratulated for the draft articles it had drawn up, but it was still too soon to relinquish the matter and submit it to the General Assembly. It would be preferable to request the Commission to elaborate a draft convention itself, on the basis of its draft articles, and then recommend it to the General Assembly for adoption.

44. **Mr. Jacovides** (Cyprus) said that the current debate was intended to provide the opportunity for representatives of States to offer an evaluation of the report of the International Law Commission, to make general comments on the topics under consideration and to provide answers in respect of issues where the Commission needed the guidance of the General Assembly in its work. The views expressed orally by Governments during the debate should be given the same weight as the written comments of States in response to the questionnaires. Small States, in particular, were necessarily limited in resources for producing written comments on a large variety of topics.

45. His delegation noted with satisfaction that the Commission had completed the second reading of the draft articles on State responsibility and had recommended that the General Assembly should take note of the articles in a resolution, to which they would be annexed, with a view to eventually considering the possibility of convening an international conference of plenipotentiaries to examine the draft articles and adopt a convention based thereon.

46. With regard to international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage resulting from hazardous activities), his delegation noted with satisfaction that the Commission had completed the second reading of the draft articles on that topic and had recommended the elaboration of a convention based thereon by the General Assembly. His delegation commended the Special Rapporteur, Mr. Rao, and trusted that the recommendation would be duly acted upon.

47. As for reservations to treaties, his delegation noted the progress that had been made through the adoption of draft guidelines on the formulation of reservations and interpretative declarations, commended the work of the Special Rapporteur, Mr. Pellet, and looked forward to the early completion of the Guide to Practice that would result from the work on the topic. In response to the question discussed in paragraph 20 of the Commission's report, his delegation felt that it would be preferable for the Commission not to include in its draft Guide to Practice draft guidelines specifically relating to conditional interpretative declarations. Nothing should be done to unduly encourage the late formulation of reservations.

48. With regard to diplomatic protection, his delegation welcomed the progress made on the issues of continuous nationality, transferability of claims and the exhaustion of local remedies and commended the Special Rapporteur, Mr. Dugard, for his progressive approach to that very classical chapter of international law. More particularly, his delegation was inclined to answer in the affirmative the question asked in paragraph 28 (b), on protecting shareholders who were nationals of the State exercising the diplomatic protection.

49. On the topic of unilateral acts of States, his delegation thanked the Special Rapporteur, Mr. Rodríguez Cedeño, and, with regard to paragraph 29 of the report, felt that Governments should be encouraged to assist the Special Rapporteur by replying to the relevant questionnaire on State practice.

50. His delegation had been pleased to note the traditional exchanges of information between the Commission and, respectively, the International Court of Justice, the Asian-African Legal Consultative Committee, the Inter-American Juridical Committee and the Committee of Legal Advisers on Public International Law of the Council of Europe. Indeed, the current exchanges in New York between the President and members of the International Court of Justice, together with legal advisers from foreign ministries, and the Sixth Committee served the same purpose in a different setting. Such relations should be encouraged as a means of promoting the common objective of enhancing the role of international law, its codification

and its progressive development. It was no coincidence that major advances in the fight against international terrorism, such as Security Council resolution 1373 (2001) of 28 September 2001, had been achieved with unanimity in the Security Council, and his delegation hoped that the General Assembly would achieve equivalent results.

51. With regard, in particular, to chapter IV of the Commission's report, it was generally acknowledged that the topic of State responsibility was a very important one in international law. Initially, the topic had focused primarily on responsibility for injury to aliens; however, with the development of *jus cogens* and its acceptance in the 1969 Vienna Convention on the Law of Treaties, and the existence of hierarchically higher rules as set out in the Charter of the United Nations, State responsibility currently rested on a much broader foundation. Moreover, it was acknowledged also by the International Court of Justice, beginning with the *Barcelona Traction* case in 1970, that *erga omnes* obligations existed and that the interests of the whole international community and of international public policy needed to be taken into account. State responsibility had thus been transformed by way of progressive development, and the Commission must ensure that the expectations of the international community and, in particular, of the new States that had come into existence after the classical rules of international law on the topic had been formulated, were not disappointed.

52. His delegation very warmly congratulated the Special Rapporteur on the remarkable job he had done on the topic. He had succeeded in modernizing and streamlining the text with the assistance of the Drafting Committee. It had been necessary to remove certain elements — notably article 19 of Part One relating to State crimes — in order to arrive at long last at a conclusion by way of compromise. The Commission could take credit for the result, and his delegation could accept and support it, since it recognized that the better was the enemy of the good and that making international law was the art of the possible.

53. The absence from the Commission's draft of any provision for dispute settlement was indeed a shortcoming. His delegation had always strongly advocated the position that, as a matter of principle, all multilateral legal treaties concluded under the auspices of the United Nations should include a comprehensive, expeditious and viable dispute settlement system entailing a binding decision regarding all disputes arising out of the provisions of the treaty in question. For Cyprus that position was dictated by its attachment to the general principle of equal justice for all States and its national interest as a small and relatively weak State which needed the protection of the law, impartially and objectively administered, in order to safeguard its legitimate rights. Cyprus also attached a special importance to the establishment of an effective dispute settlement mechanism, which was the *conditio sine qua non* of a well-functioning legal regime of State responsibility. Of course, as was expressed in paragraph 60 of its report, the Commission was leaving it to the General Assembly to consider whether and in what form provisions for dispute settlement could be included in the event that the Assembly should decide to elaborate a convention; that solution, however, was not fully satisfactory.

54. As for the form of the draft articles, Cyprus, along with many other States, notably the Nordic States, had stated in last year's debate that its preference was for a legally binding convention, which would take its place alongside other major codification projects such as the Vienna Convention on the Law of Treaties, the Law of the Sea Convention and, most recently, the Rome Statute of the International Criminal Court. However, to be realistic, Cyprus did not preclude other alternatives provided that its basic concerns were met, and it noted that several suggestions had been made, including the inscription of the topic as a specific item on the agenda of a subsequent session of the General Assembly. Under those circumstances, the delegation of Cyprus could accept the Commission's recommendation in paragraph 67 of its report, namely, that the Assembly should in a resolution take note of the draft articles and annex the text of the articles to that resolution, but it would nevertheless strongly support the position that the resolution in question should also propose that, given the importance of the topic, the Assembly should at the second stage consider the adoption of a convention on the topic, including compulsory third party dispute settlement provisions. That might prove to be an unrealistic aspiration, but at least the door was being kept open. Thus his delegation could, with some reluctance, accept the Commission's recommendations as spelled out in paragraphs 72 and 73 of the report, while also accepting the proposed change in the title of the topic.

55. His delegation had noted the various points of view expressed regarding serious breaches of obligations to the international community as a whole, and agreed that chapter III of Part Two should be retained and that the clear emphasis should be on peremptory norms as reaffirmed in the 1969 Vienna Convention on the Law of Treaties. In that connection, and generally with regard to *jus cogens*, he drew attention to document A/CN.4/454 of 9 November 1993, which contained much relevant material of direct interest to the consideration of that very important notion. Furthermore, the distinction between "serious breaches" of peremptory norms and trivial or mild breaches of such norms was difficult to apply. The presumption should be that breaches of peremptory norms were always serious.

56. As for countermeasures, which were the subject of Part Two, chapter II, they should be restricted and narrowly defined, as they lent themselves to abuse at the expense of weaker States. They should be aimed at reparation, rather than punishment. They should be applied objectively and be proportional and subject to third party dispute settlement provisions. Armed countermeasures, which were contrary to Article 2, paragraph 4, of the Charter of the United Nations, were contrary to customary law as well as to *jus cogens*. In that connection one was reminded of the well-known dictum of the International Court of Justice in the *Corfu Channel* case. Other rules of *jus cogens*, including human rights rules, were not subject to derogation in the case of countermeasures. In light of those considerations Cyprus had determined its position regarding the Commission's proposed draft articles on the topic.

57. His delegation had carefully noted and fully accepted the general provisions set out in Part Four applicable to the draft articles as a whole. Article 55, which was based on the principle *lex specialis derogat legi generali*, made clear that the articles had a residual character and, in case of inconsistency, pointed out that the special rule prevailed. It was rightly stated in the commentary that "States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law". Indeed, the essence of peremptory norms was that they could not be derogated from by agreement between the parties *inter se* because that would be contrary to international public policy.

58. Article 56 made it clear that the draft articles were not exhaustive and did not affect other applicable rules of international law on matters not dealt with. Examples cited in the commentary included the invalidity of a treaty procured by an unlawful use of force, a fundamental change of circumstances or termination in the case of a material breach, all stemming from the law of treaties and not from the rules of State responsibility. Article 57 excluded from the scope of the articles questions concerning the responsibility of an international organization or of any State for the conduct of an international organization. Article 58 was also a saving clause regarding the question of the individual responsibility under international law of any person acting on behalf of a State. However, as the commentary correctly pointed out, "The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out", a principle reflected in article 25, paragraph 4, of the Rome Statute of the International Criminal Court. Finally, article 59 reserved the effects of the Charter of the United Nations. The commentary made it clear that the articles were in all respects to be interpreted in conformity with the Charter of the United Nations, and that the principle under Article 103 of the Charter that in the event of a conflict between the obligations under the Charter and obligations under any other international agreement, the obligations under the Charter should prevail.

59. Under chapter V, Circumstances precluding wrongfulness, his delegation had carefully noted article 20, on consent. The previous year his delegation had stated that the issue of consent, which must be freely given, should be approached with caution, since the very essence of the notion of *jus cogens* was that the parties could not derogate from it by agreement between them because that would be incompatible with international public policy. In that same context of draft article 20, on consent, his delegation had stated that it fully shared the Israeli delegation's expression of regret that the exception regarding the ineffectiveness of consent in case of peremptory obligation, as contained in draft article 29 of 1996, had not been retained. He pointed out that the commentary on draft article 20 discussed certain modalities which needed to be observed for consent to be considered valid, and reference was made to "cases in which consent may not be validly given at all", with a cross reference to draft

article 26, on compliance with peremptory norms, which applied to chapter V as a whole.

60. Paragraphs 5 and 6 of the commentary on article 26, as well as paragraph 9 of the commentary on article 45 relating to loss of the right to invoke responsibility, were pertinent in that regard. While paragraph 5 of the commentary to article 26 enumerated the peremptory norms recognized as such under the criteria of article 53 of the Vienna Convention of 1969, referring to aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination, there was no express reference to the use of force in violation of Article 2, paragraph 4, of the Charter and which might or might not in all cases be covered by the term "aggression", a point which needed to be borne in mind given the uncertainty surrounding the term and the role of the Security Council in that regard. He also noted that paragraph 6 of the commentary to draft article 26 stated that "One State cannot dispense another from the obligation to comply with a peremptory norm [...] whether by treaty or otherwise". While a valid consent might be relevant for a lawful purpose, it could not negate an applicable peremptory norm or make legal what would be illegal under an applicable peremptory norm, for the reasons stated earlier.

61. Turning to draft article 21, on self-defence, he recalled that Article 51 of the Charter preserved a State's inherent right of self-defence if an armed attack occurred until such time as the Security Council had taken appropriate measures. Accordingly, to that extent and within those limits, a State acting in self-defence was not in breach of Article 2, paragraph 4, of the Charter.

62. His delegation attached particular importance to chapter III of part two, containing articles 40 and 41 and concerning serious breaches of obligations under peremptory norms of general international law. Under Article 2, paragraph 6, of the Charter, "The Organization shall ensure that States which are not Members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security." Under Article 103 of the Charter, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." In its *dictum* in the *Barcelona Traction* case and, more recently, in the *East Timor* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* cases, the International Court of Justice had made it clear that, for the purposes of State responsibility, certain obligations were owed to the international community as a whole and that, by reason of the importance of the rights involved, all States had an interest in their protection.

63. Under articles 53 and 64 of the Vienna Convention on the Law of Treaties (1969), the concept of peremptory norms of international law had been accepted, following recognition of the existence of substantive norms of a fundamental character such that no derogation from them was permitted, even by treaty. For his delegation, the proposed chapter III was a compromise which made it possible to put an end to the long-standing controversy surrounding article 19 on the question of international crimes as offences distinct from international delicts. It represented an acceptable compromise, particularly in the light of new developments in the area of individual criminal responsibility, such as the adoption in 1998 of the Rome Statute of the International Criminal Court. His delegation was pleased to see in the commentary on and footnotes to that chapter, that the concept of peremptory norms of general international law was recognized in international practice, in the jurisprudence of national and international courts and in legal doctrine. At the Vienna Conference on the Law of Treaties, Cyprus, together with other States, had played an active role in promoting acceptance of that notion. His delegation also drew attention to the fact that not only "aggression" but also the "unlawful use of force contrary to the principles of the Charter" were prohibited by *jus cogens*, as footnotes 675 and 679 to the report under consideration indicated.

64. His delegation noted that, under article 41, all States must cooperate to bring to an end through lawful means any serious breach within the meaning of article 40 and that no State should recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation. It was therefore a question of obligations of non-recognition, non-assistance and cooperation to bring the breach to an end. His delegation had taken careful note of the commentary and the footnotes accompanying the draft article and fully subscribed to them. In addition to footnote 697, which cited the *Loizidou v. Turkey, Merits* case of 1996

and the judgement handed down by the European Court of Human Rights in the *Cyprus v. Turkey* case, attention should be drawn, in the context of paragraph 4 of the commentary concerning the reaction of the Security Council to the invasion of Kuwait by Iraq in 1990, to the equally clear position of the Security Council in its resolutions 541 (1983) and 550 (1984). As in the case of Kuwait, no State had recognized the legality of the action undertaken in Cyprus on 15 November 1983 but, unlike the attempted annexation of Kuwait which had subsequently been reversed, no reversal had yet taken place in the case of Cyprus.

65. With reference to part III, his delegation had noted its content and, generally speaking, it agreed with the approach on the invocation of responsibility of a State by the specifically injured State and, when circumstances permitted, where an obligation was owed to the international community as a whole. It had also taken note of chapter II on countermeasures and recalled the need for dispute settlement procedures in that regard. It noted the approach taken in draft articles 49 to 54 and particularly welcomed the provisions of article 50, paragraph 1, and its commentary. Indeed, countermeasures should not affect: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian nature prohibiting reprisals; and (d) other obligations under peremptory norms of general international law. The reference to "other" obligations under peremptory norms was particularly apt in that context in that it indicated clearly that the prohibitions of subparagraphs (a), (b) and (c) of paragraph 1 could also be counted as peremptory norms. Moreover, the very clear wording of subparagraph (a), stating "the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations," was preferable to the references to "aggression" found elsewhere in the commentaries.

The meeting rose at 5.20 p.m.

United Nations A/C.6/56/SR.14

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Chairman: Mr. Lelong ..... (Haiti)

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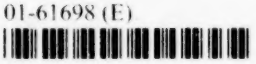

The meeting was called to order at 10.20 a.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10 and Corr.1)

1. **Mr. Kanu** (Sierra Leone) said that the draft articles on responsibility of States for internationally wrongful acts adopted by the International Law Commission constituted a comprehensive and balanced text. The Commission was to be commended for having addressed the most controversial issues. His delegation felt, however, that some of the provisions required further attention.

2. In attempting to distinguish between ordinary breaches and breaches of norms of a fundamental character, the Commission had originally posited the notions of international crimes and international delicts of a State, but had wisely decided instead to refer to serious breaches of obligations to the international community as a whole. His delegation had welcomed that approach but had expressed doubts about the precision of the term. The compromise language of the current article 40, paragraph 1, addressed some of those concerns by referring to a serious breach by a State of an obligation arising under a peremptory norm of general international law, a wise choice since the concept of peremptory norms was sufficiently defined by the Vienna Convention on the Law of Treaties and the jurisprudence of the International Court of Justice. Moreover, the definition of "serious" as contained in article 40, paragraph 2, was based on ideas in widespread use in international law.

3. His delegation would nonetheless welcome language that would prevent the assessment of the seriousness of a breach from being an arbitrary determination. The wording "international community as a whole" had been retained in a number of other articles, and his delegation was not convinced that departing from the language of the Vienna Convention was appropriate. Whatever language was adopted should, in any case, be without prejudice to the rights of persons or entities arising from the responsibility of a State, as set forth in article 33, paragraph 2.

4. His delegation welcomed the emphasis given to the principle of the irrelevance of internal law, expressed in the final draft of articles 3 and 32. Its inclusion reflected a well-established norm and gave an incentive to States to bring their domestic legislation into conformity with international standards.

5. The main difficulty with respect to countermeasures was to strike a balance between the need for flexibility and effectiveness, on the one hand, and the desire to prevent the abuse of countermeasures, especially when directed against smaller or weaker States. The final draft articles represented a step forward compared with the previous version in that they specified the obligations not affected by countermeasures (art. 50), recognized the principle of proportionality (art. 51), stipulated that countermeasures should be terminated as soon as the responsible State had complied with its obligations (art. 53) and in general established some important safeguards against the misuse of countermeasures.

6. His delegation was still concerned, however, about the unilateral assessment of the legitimacy of countermeasures. Moreover, some of the safeguards in article 52 would weaken the flexibility and effectiveness of countermeasures. The requirements of prior notification and negotiation in article 52, paragraph 1 (b), for example, imposed an obligation not recognized under international law, and the prohibition in article 52, paragraph 3 (b), against taking countermeasures when the dispute was pending before a court seemed incompatible with the possibility of taking urgent countermeasures rightly provided for in article 52, paragraph 2.

7. On the question of measures taken by States other than the injured State, his delegation welcomed the new wording of article 54 in the form of a saving clause much less open to abuse than the previous version but leaving open the possibility of a collective response by States within the context, for example, of the United Nations. Although several articles required improvement, his delegation thought that chapter II was useful overall and should be retained.

8. His delegation supported the recommendation of the Commission to the General Assembly that it should take note of the draft articles in a resolution and annex the articles thereto, and it would be willing to consider, at a later stage, negotiating a convention on State responsibility.

9. **Mr. Gómez Robledo** (Mexico) said that the draft articles adopted by the Commission were the most refined statement available of the rules governing the responsibility of States for internationally wrongful

acts and constituted an invaluable work of codification and progressive development of international law. The articles attempted to strike a balance between heavily debated opposing viewpoints in an area of international law that was rapidly evolving and in which the need for rules and standards was increasingly felt.

10. Unfortunately, like all products of compromise, the articles left some room for doubt and reservations. The most serious shortcoming was the lack of dispute settlement provisions, which seemed at best contrary to good sense and at worst a fatalistic acceptance that the injured State would inevitably resort to its own measures. His delegation was not convinced by the argument that dispute settlement provisions were only appropriate if the articles were to take the form of a convention.

11. With respect to article 25, his delegation agreed with the Commission that necessity as a ground for precluding wrongfulness was an exceptional case that should be subject to strictly defined conditions to safeguard against possible abuse by States, especially in view of the subjectivity of the phrases "essential interest" and "grave and imminent peril". In no case should the State invoking necessity be the sole judge of its existence, nor should the article be taken in any way as legitimizing certain concepts, such as anticipatory self-defence, that were not firmly grounded in the rules relating to the use of force and the definition of aggression.

12. Although the Commission had improved the wording of Part Two, chapter III, on serious breaches of obligations under peremptory norms of general international law, there were still problems with articles 40 and 41. His delegation could not agree that it was currently accepted that all States were obliged to cooperate to bring to an end a serious breach of a peremptory norm of international law. The broad language of the chapter invited abuse of countermeasures and ignored the system of collective security provided for in the Charter of the United Nations. Although "peremptory norms of international law" was a more precise wording than "obligations to the international community as a whole", it was open to subjective interpretation, because there was still no well-defined list of peremptory norms. Moreover, the earlier phrase had been retained in many of the draft articles.

13. His delegation was also concerned that by defining a "serious breach" as a threshold for the application of the articles, the Commission was implying the existence of a category of "non-serious" breaches of peremptory norms not mentioned in the Vienna Convention. Since the very concept of peremptory norms had been developed to safeguard the most precious legal values of the community of States, it was difficult to justify the distinction. His delegation felt that the best alternative was to eliminate chapter III of Part Two, on the understanding that nothing in the draft articles affected the provisions of the Charter of the United Nations.

14. In article 44, subparagraph (b), it was questionable whether the requirement that local remedies must be exhausted should be made dependent on those remedies being "available and effective". The rule of exhaustion of local remedies was well established in international law. A determination of their effectiveness implied a value judgement passed on the internal legal system of a State and could lead to abuse by allowing the injured State to bypass the legal remedies of the responsible State. The American Convention on Human Rights and the International Covenant on Civil and Political Rights made exceptions to the exhaustion of local remedies dependent not on an evaluation of their effectiveness but on whether their application was unreasonably prolonged, and the decisions of the Inter-American Court of Human Rights had been consistent in that regard.

15. As if article 42 were not broad enough, article 48 further expanded the opportunities for States other than the injured State to invoke the responsibility of a State and take measures against it, if the obligation breached was owed to the international community as a whole. It was unclear precisely which obligations were meant. His delegation would prefer the language of the Vienna Convention, which referred to "the international community of States as a whole". Moreover, the prerogatives of a State entitled to invoke responsibility should have been expressly limited to those mentioned in paragraph 2, in order to rule out any application of countermeasures by States other than the injured State.

16. Despite some doubts about the inclusion of Part Three, chapter II, on countermeasures, his delegation felt that the final result was balanced and reinforced the principles that countermeasures were limited in scope, were restricted to the purpose of securing compliance

with the obligation breached and must be proportionate to the injury suffered. Although those elements were insufficient to prevent abuses, they would help to guide the conduct of States.

17. On a drafting point, he wondered why the drafters had chosen to use the words "commensurate with" in the English version instead of "proportionate to" in draft article 51, since "proportionality" was used in the title and was a concept well established in international law.

18. His delegation had concerns about the provision in article 52, paragraph 2, whereby an injured State might take urgent countermeasures if necessary without notifying the responsible State or offering to negotiate with it. As in many other places in the draft articles, the decision was left entirely to the injured State, and the provision could have the effect of legitimizing abuses. Here, again, the lack of a dispute settlement mechanism was sorely felt.

19. His delegation had reservations about the inclusion of draft article 54, since it seemed to invite States other than the injured State to take countermeasures against a responsible State and was silent on other mechanisms that existed in the organized international community for dealing with breaches of international law.

20. Although his delegation had always been in favour of a convention as the only appropriate outcome for the important work done by the Commission over nearly half a century, the idea of a convention did not appear to enjoy a consensus at present. His delegation could therefore support a step-by-step approach towards the ultimate goal, as recommended by the Commission; that the General Assembly should simply take note of the draft articles, however, seemed inadequate as the first step. It would be better to allow States a year or two to weigh the text and commentaries carefully before deciding what to do with them. His delegation therefore proposed that the General Assembly should express its appreciation for the work of the Commission, call the attention of States to the draft articles and include an item on the agenda of the fifty-seventh session of the General Assembly entitled, "Responsibility of States for internationally wrongful acts". Under that agenda item, the Assembly could consider annexing the draft articles to a resolution and possibly taking future action on them, including the adoption of a legally binding instrument.

21. **Mr. Economides** (Greece) said that, with the submission of the draft articles, the Commission had filled an immense gap by codifying an area of international law — its most important area — that had been highly decentralized and poorly developed but was presently in transition from the status of exclusively customary law to that of written law. Being a consensus document, the articles, of course, represented extensive compromises.

22. He wished to draw attention to both the strong and the weak points in the articles, difficult though that would be, given the inevitable high degree of subjectivity involved. The first was the emphasis placed on the concept of the international community as a whole, to which States owed obligations. The concept was expressed explicitly in draft article 33, paragraph 1, implicitly in draft article 40 and again explicitly in draft articles 42 and 48, paragraph 1 (b). Thus in cases of breaches of international obligations to the international community and, a fortiori, in those involving *jus cogens*, not only a specially affected State but also other States were entitled to invoke the responsibility of the State which had committed the internationally wrongful act; the difference between the two situations was that the injured State acted in its own interest, whereas other States acted in a common interest, which amounted to nothing more nor less than that of the international community as a whole. That it should be seen as a distinct entity, with legally protected rights, boded well for the future both of the international community and of international law.

23. Another extremely positive aspect of the articles was the considerable impetus they gave to the peremptory norms of general international law (*jus cogens*), which had first been adopted by the 1969 Vienna Convention on the Law of Treaties and had since become part of international public policy. Obligations arising under them outweighed any other international obligation, whether agreement-based, customary or of any other nature. The draft articles devoted several significant provisions to such norms, including article 26, the wording of which was greatly preferable to that of draft article 21 as provisionally adopted by the Commission's Editorial Committee the previous year. Chapter III of Part Two — articles 40 and 41 — provided specifically for the international responsibility entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law, an approach that had

ultimately replaced the provisions on State crimes contained in the famous draft article 19 adopted on first reading. The term "crimes" had indeed been deleted, but the substance of the rules had been retained. There were also other articles, such as article 50, paragraph 1, which related, directly or indirectly, to obligations arising under such peremptory norms. The articles therefore substantially strengthened an institution of great significance in international law.

24. The third positive aspect of the draft articles was the concept of consequences envisaged for serious breaches, a concept that had developed gradually since the end of the Second World War. The process had begun with Chapter VII of the Charter of the United Nations and continued with the introduction of the concept of peremptory norms, the case law of the International Court of Justice, particularly its 1970 judgment in the *Barcelona Traction* case, the important advances in international criminal law, article 19 of the draft articles on State responsibility as put forward by Mr. Ago and adopted by the Commission on first reading in 1980 (the first reference to State crimes) and, lastly, the doctrine according to which, ever since Bluntschli had propounded it in 1868, a serious breach affecting the essential interests of the international community itself could not be treated in the same way as a minor breach causing simple damage to a State.

25. Serious breaches of obligations owed under *jus cogens* norms entailed the same consequences as those produced by any other internationally wrongful act, as outlined in articles 30 (a) (Cessation), 29 (Continued duty of performance), 30 (b) (Assurances of non-repetition) and, above all, 34 ff. (Reparation, which could take various forms). Of particular significance was the fact that restitution — re-establishing the situation that had existed before the wrongful act had been committed — was applied particularly strictly in cases of breaches that affected international public order: for example, cessation of illegal occupation and restitution of a territory to the State to which it belonged.

26. The articles also contained more specific consequences, contained in article 41, which obliged States to cooperate to bring to an end through lawful means any serious breach, not to recognize as lawful a situation created by a serious breach and not to render aid or assistance in maintaining that situation. Although only the first obligation was of a positive nature, while the other two entailed abstaining from a specific course of action, they amounted to international solidarity with the injured State and, ultimately, with the whole international community.

27. By the same token, serious breaches of such recognized peremptory norms as the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture and the right to self-determination should be tackled collectively at the global level. In that context, it was regrettable that the Commission had ultimately deleted draft article 42, paragraph 1, as provisionally adopted by its Editorial Committee the previous year, since it had provided for an additional consequence, namely, obliging the responsible State to pay damages commensurate with the seriousness of the breach, or punitive damages.

28. Overall the regime of State responsibility had been brought up to date: any serious breach of an obligation under peremptory norms of general international law entailed far more serious consequences, although it should be said that the word "serious" was superfluous, since any breach of a peremptory norm was, by definition, serious. Meanwhile, the traditional bilateral relationship between the injured and the responsible State had been abandoned, not only for breaches under draft articles 40 and 41 but for all collective obligations. In that context, draft article 48, which entitled States to act collectively, in effect exercising the rights of an injured State, including that of requiring performance of the obligation of reparation, was particularly significant. A State infringing collective obligations would therefore have to confront not just the injured State but also some or all of the other States that made up the international community. State responsibility would come to play an increasingly important role in the settlement of collective problems.

29. Another positive aspect of the articles was that there was less emphasis on the concept of injury as a prerequisite for acknowledgement of responsibility. Article 1, which stated that "Every internationally wrongful act of a State entails the international responsibility of that State", although astonishingly clear and simple, covered every eventuality. In that context, he recalled that many international obligations, particularly those of a negative nature, could be breached without injury necessarily being caused.

30. The draft articles had their weak points, but he would draw attention to only two. The first related to

article 52, on countermeasures. Such measures, even if peaceful, were archaic and retrograde, since their reliance on force obviously benefited powerful States. They also undermined the authority and prestige of international law; it was disturbing to see a country taking the law into its own hands. Paragraph 2 of the article allowed the injured State to "take such urgent countermeasures as are necessary to preserve its rights", even if the State held responsible denied its responsibility and accepted that the dispute should immediately be brought before a court. The provision, which sanctioned unilateral action, was most regrettable. Moreover, the purpose of the article had been skewed by the deletion — unjustified, in the view of his delegation — of former draft article 53, paragraph 4, provisionally adopted by the Editorial Committee the previous year, under which countermeasures other than urgent ones could not be taken while negotiations in good faith were continuing.

31. Another weakness was the absence of dispute settlement procedures to be used following any application of the draft articles, even though such procedures would be most useful. Originally, the draft articles had contained a third part dealing with dispute settlements (draft articles 54-60 and two annexes). As the representative of China and others had said, it was a regrettable omission which, it was to be hoped, would be rectified by States, preferably in the context of a plenipotentiary conference with the task of turning the draft articles into an international convention.

32. Although the draft articles contained some compromises over difficult or controversial issues, the overall effect was positive: comprehensive and concise, they would fill an enormous void in international law and would prove of great use to States and the international community. Moreover, they were the most important draft articles ever presented to the Committee by the Commission and fully merited speedy conversion into an international convention.

33. **Mr. Rao** (India) after pointing out that the second reading of the draft articles had been completed in four years, by contrast with the 40 years spent on the first reading, said that, as finalized, the articles had considerable merit. They had been trimmed down and the concepts involved made less complicated, with some of the most difficult articles having been reformulated. It was a matter of satisfaction to note that the final draft had taken into account recent relevant case law of the International Court of Justice and other legal and human rights bodies, a process which involved time-consuming work and car craftsmanship.

34. The articles also dealt with some of the m complicated and controversial subjects in internatio law, including the distinction between composite complex wrongful acts; continuing and compl wrongful acts; the exhaustion of local remedies; concept of State crimes; circumstances preclud wrongful acts, particularly compliance with obligati arising under peremptory norms of gen international law or *jus cogens*; the concept countermeasures; and the relationship between draft articles and rules specially agreed upon by St (*lex specialis*) in respect of specific aspects international law, such as those relating to hu rights, international trade or environmental legislat the law of the sea or the primacy of obligations un the Charter of the United Nations.

35. In addition, the articles no longer provided for concept of State crimes, which had been satisfacto replaced by the concept of the "serious breach" of obligation arising under a peremptory norm of gen international law (art. 40), a breach being serious involved a gross or systematic failure by responsible State to fulfil the obligation (art. 40, p 2). In that connection, he drew attention to the gen commentary under Chapter III and article 40, wh contained an explanation of the concept of a "seri breach", together with some useful examples peremptory norms of general international law. Commission had rightly decided that it was appropriate to set out examples of such norms in text of article 40 itself, any more than it was in the of article 53 of the Vienna Convention on the Law Treaties.

36. The commentary — like that on article 53 of Vienna Convention — mentioned the prohibition aggression, slavery and the slave trade, genocide, racial discrimination and apartheid. It also stated the prohibition against torture and certain basic rule international humanitarian law had justifiably acqui the status of a peremptory norm. However, anot example of a peremptory norm mentioned in commentary was the obligation to respect the righ self-determination. In the view of his delegation, right to self-determination essentially involved right of a people to seek independence from colo

rule: secession was not authorized in exercise of the right to self-determination in the post-colonial era.

37. He noted that the earlier concept of differently injured States, which had not been developed very far, had not been pursued. Article 48, however, identified the limits within which a State other than the injured State could invoke the responsibility of another State: it could seek cessation of the wrongful act and performance of the obligation only in the interest of the injured State or the beneficiaries of the obligation breached. The case of a plurality of injured States was covered separately. Under draft article 47, however, an injured State was not entitled to recover, by way of compensation, more than the damage it had suffered itself.

38. Drawing attention to the articles relating to countermeasures, most specifically articles 49, 50 and 51, he noted that, for lack of consensus, there was no provision specifying the need to seek resolution of a dispute by peaceful means before resorting to countermeasures. Nor was there any provision for punitive damages, a concept which had not been supported in practice.

39. Especially in the case of chapter III of Parts Two and Three, the articles seemed to be more akin to progressive development than to codification. The countermeasures referred to were only those not involving the use of force. The consequences of State responsibility were clearly explained as being options available to States, which could themselves decide on the manner and method of settlement of the claims involved. It could be assumed that the concept of integral obligations, which featured in draft article 48, paragraph 1 (a), would rarely come into play.

40. The articles addressed only secondary rules of State responsibility, which would apply only in the event of an internationally wrongful act defined by a primary rule. That called for a degree of universality still to be achieved in international law. Attaining that goal depended on sufficient progress being made on the right to development, the transfer of technology on an equitable basis, a more equitable system of world trade and intellectual property and the establishment of a more universal system of international criminal justice which would categorize as a war crime the use of weapons of mass destruction, including nuclear weapons, and would make terrorism a crime against humanity. In the present circumstances, the concepts of *jus cogens* and *erga omnes*, together with the notion of "serious breaches of obligations under peremptory norms of general international law", would remain only a distant rallying cry for most States. Indeed, they could be used by more powerful States to justify debilitating sanctions against less powerful poor nations.

41. In view of the complexity of the issues covered in the draft articles and the delicate balance achieved on the totality of the package, the General Assembly should express its appreciation to the Commission and take note of the draft articles, which could be adopted in a suitable form following a pause for study and reflection.

42. **Mr. Lobach** (Russian Federation) said the topic of State responsibility was one of the most important and complex the Commission had ever had to deal with. For the first time in the history of international law, the norms governing the responsibility of States for acts contrary to international law had been framed in writing, and Professor Crawford, as last in the line of distinguished jurists who had served as special rapporteurs on the topic, had scored a historic success. In the view of his delegation, the draft articles adopted on second reading were well balanced and took full account of State practice, case law and legal doctrine in the field. The Commission had achieved compromise solutions for most of the problematic issues on the basis of the proposals and observations made by Governments.

43. One of the most controversial of those issues was countermeasures. His delegation had always been in favour of including provisions on countermeasures, which were not themselves part of State responsibility but did feature in its implementation. They were an effective means for the injured State to achieve cessation of the unlawful acts and compensation for the damage done. However, they were justified only as long as those aims had not been achieved, and he was satisfied that Part Three, chapter II, dealt adequately with the conditions governing their use.

44. As for the right of States other than the injured State to resort to countermeasures, he recalled that the former draft article 54 had excited considerable opposition, not least because the scope for countermeasures seemed to be virtually unrestricted and could mean that they would be taken to protect a collective interest even while action taken by the

competent organs of the United Nations was in progress. Another argument had been that the means whereby an injured State could seek legal protection, and the corresponding right of a State having a "legal interest", could not be identical in scope. The former draft article 54 did have the advantage of encouraging States to cooperate under article 41 of the present draft, and of "stimulating" the responsible State to fulfil its obligations if the injured State was unable to resort to countermeasures of its own accord. It could too easily have been abused, however, and that risk had outweighed its practical advantages. He welcomed the decision to omit it.

45. The new article 54 had not preserved all its good points, however. The right of States other than the injured State to take countermeasures was now derived from only one criterion — that the measures should be lawful — whereas the previous draft article 54 stated that such a State could take countermeasures only to the extent that it would itself be entitled to take them. The new wording therefore gave such a State greater rights than the injured State.

46. Turning to Part Two, chapter III, he expressed approval of the differentiated approach taken to breaches of obligations, depending on their seriousness. International law certainly contained principles and norms the breach of which could be defined as serious, and the process of defining the obligations involved for the purposes of State responsibility had been a lengthy one. The most recent definition, "obligations arising under peremptory norms of general international law", was the best yet achieved. The concept of *jus cogens* was recognized in international practice and in the practice of international and national courts, as well as in articles 53 and 64 of the Vienna Convention on the Law of Treaties. The definition of a serious breach in draft article 41 adopted on first reading had raised the question of which interests, and which obligations, were intended. It was obvious that defining an internationally unlawful act as a crime would inevitably be a subjective affair.

47. The subjective element was reduced by the wording of article 41 adopted on second reading, according to which the obligation was owed to the international comn unity as a whole and was essential for the protection of its fundamental interests. However, the range of such obligations in international law was far from clear, and the classification of breaches according to that criterion could cause difficulty. He therefore supported the new definition, in article 40, of a serious breach of an international obligation as one "arising under a peremptory norm of general international law", an approach which avoided subjective classifications of the wrongful act and emphasized the special status of peremptory norms.

48. In that connection, he also welcomed the inclusion in the text of the new article 26, and the Commission's decision not to include in article 41 a provision on the obligation of the responsible State to make reparation reflecting the seriousness of the breach. That requirement was partly covered in article 31, and in any case an additional provision on reparation might seem to be referring to punitive damages, a concept unknown in international law.

49. He further welcomed the removal from article 41 [the former draft article 42] of the clause requiring States to cooperate "as far as possible" to bring the breach to an end. It remained unclear, however, what the "particular consequences" of a serious breach were. One solution might be to specify the forums in which States were to cooperate in order to bring the breach to an end. For that purpose, draft article 48, paragraph 2, could provide that the right of a State other than the injured State to claim performance of the obligation of reparation applied only in the case of a serious breach. In other cases, States could only claim cessation of the internationally wrongful act, with guarantees of non-repetition.

50. He welcomed the absence in Part One, chapter V, of humanitarian intervention as a circumstance precluding wrongfulness. However, he doubted whether it was right to include the provision, in article 25 (a), that necessity could be invoked as a ground for precluding the wrongfulness of an act if the act was "the only way for the State to safeguard an essential interest against a grave and imminent peril". If States were given that right, it could be used to justify completely unlawful acts. International law did not offer any definition of "an essential interest", so it would inevitably be defined in each specific instance according to a whole range of factors; indeed, the commentary showed how variously the courts interpreted the concept.

51. Finally, as to the form of the draft articles, his delegation was in favour of elaborating a universal convention which would stand alongside the Vienna

Convention on the Law of Treaties as a cornerstone of public international law. The adoption of a legally binding instrument in such a key area as State responsibility would certainly help to stabilize international relations. In view of the difficulties along that path and the views expressed in the Committee, however, his delegation supported the Commission's decision to recommend to the General Assembly that it take note of the draft articles in a resolution, to which the text would be annexed. That would be the first step towards the adoption of an international convention.

52. **Mr. Enkhsaikhan** (Mongolia) said that the topic of State responsibility had significant implications for international relations, for strengthening international peace and security, and for fighting international terrorism. The importance of the Commission's final report on the topic, and of its recommendations, could not be overstated. Several articles of the earlier drafts had already been cited in judgements and advisory opinions of the International Court of Justice, including the discussion of necessity as a factor precluding wrongfulness in the *Gabčikovo-Nagymaros* case. He therefore hoped to see the topic finally codified, and he welcomed the simplified language of the new draft and the user-friendly nature of the commentary.

53. The actual text of the draft articles was more balanced. He supported the deletion of the former draft article 19, since questions of individual criminal responsibility were now dealt with in the Statute of the International Criminal Court. On the other hand, the concept of the criminal responsibility of States was not widely recognized, and it was difficult to determine the *mens rea* of sovereign States. Distinctions should be drawn between ordinary breaches of international law and serious breaches which affected all States and the international community as a whole. In that sense, the articles in Part Two, chapter III, were an improvement over their predecessors, with the reference to "peremptory norms of general international law", a concept already present in article 53 of the Vienna Convention on the Law of Treaties.

54. His delegation also agreed with the definition in article 40, paragraph 2, of a serious breach as a "gross or systematic failure by the responsible State to fulfil the obligation". Some further clarification was needed: it should be decided which organ should determine whether an internationally wrongful act constituted a "serious breach". His delegation supported the provisions of draft article 41, provided they applied to norms of *jus cogens*. It also supported the collective sanctions of non-recognition and non-assistance, which had proved useful in the case of Namibia and Southern Rhodesia.

55. He also welcomed the general thrust of article 48, on the invocation of responsibility by a State other than the injured State. Some questions would have to be answered at a later stage, such as whether a State other than the injured State could take non-forcible countermeasures either alone or with others.

56. On the controversial question of countermeasures, he felt the draft articles represented a considerable improvement. He agreed that countermeasures could be a legitimate means by the injured State to compel cessation of the wrongful act, and also that it was necessary to guard against the abuse of countermeasures. His delegation regretted, however, that the final draft omitted the provision in the former draft article 54 for a non-injured State to take countermeasures. As a small State, Mongolia believed that the option of collective action, in the form of either sanctions or countermeasures, should have been preserved in the draft articles.

57. The question of dispute settlement depended ultimately on the form of the draft articles. His delegation believed an international convention was the appropriate form. In the meantime, however, he could agree with the Commission's recommendation for the General Assembly to take note of the draft articles in a resolution, annexing the text of the draft articles. In view of the importance of the topic, it should consider at a later stage the possibility of convening an international conference.

58. **Mr. Petrů** (Czech Republic) noted with satisfaction the completion of the draft articles and paid tribute to the special rapporteurs, especially, Mr. James Crawford. Generally speaking, his delegation was satisfied with the final form of the draft articles, especially the balanced provisions on countermeasures and the broader wording of article 31, paragraph 1. However, despite the detailed commentaries on serious breaches of obligations under peremptory norms (arts. 40 and 41) and breaches of obligations owed to the international community as a whole (art. 48), there remained some lack of clarity about the reason for the use of different terminology, the relationship between the two concepts and the purpose of establishing separate regimes of consequences for a serious breach

of the former and any breach of the latter. Moreover, since the draft articles did not address the issue of who was to decide whether the breach of a peremptory norm was of a serious nature, controversies were likely to arise in practice.

59. His delegation would prefer that the General Assembly, take note of and welcome the draft articles in a resolution to which the articles would be annexed. At the current stage, his delegation had no objection to the Committee's recommendation that the Assembly should consider the possibility of convening an international conference to examine the draft articles with a view to concluding a convention on the topic.

60. **Mr. Belinga Eboutou** (Cameroon) said while the draft articles were balanced and reflected both common law and State practice, they also embodied certain aspects of the progressive development of international law which were a source of legitimate concern. Thus, while article 48 (Invocation of responsibility by a State other than the injured State) followed a trend in current international law, its scope and practical consequences required further consideration.

61. He was even more concerned at the draft articles' approach to the issue of countermeasures, which could be resorted to only by the most powerful of States. Since they were used by some members of the international community and were recognized under international law, as the International Court of Justice had confirmed in the *Gabčikovo-Nagymaros Project* case, the Commission had rightly undertaken to establish a strict framework for the practice. However, the balance achieved in former article 53 (A/55/10) had been lost in the current version of the draft articles. While he supported deletion of the word "provisional", since countermeasures would necessarily be temporary in nature, he did not understand why paragraph 4 of former article 53 had been deleted. The purpose of countermeasures was to induce the responsible State to meet its obligations under international law; thus, the taking of countermeasures against a State that was pursuing negotiations in good faith amounted to an imposition of sanctions.

62. Equally important was the relationship between countermeasures taken by one or more States and measures decided upon by the Security Council under Article 41 of the Charter of the United Nations. Article 59 did not resolve that problem, since the Charter itself did not establish whether Council-mandated measures automatically entailed the cessation of countermeas by States or whether the two types of measures c be implemented simultaneously without violating principle of proportionality.

63. He was not convinced by the arguments ag the inclusion of a dispute settlement mechanism text which contained provisions on countermeas an impartial third party would be required in ord determine whether the accused State was r responsible, and thus whether the countermeas taken against it were legitimate and proportiona whether the violation was "serious" within the mea of article 40, paragraph 1. States could not compelled to submit their disputes for settlement, s many of them had not made the declaration u article 36, paragraph 2, of the Statute of International Court of Justice and there was, as ye comprehensive convention on compulsory arbitrati

64. Lastly, he hoped that the draft articles woul adopted during the current session of the Ge Assembly in a resolution establishing a time pe within which a diplomatic conference would convened with a view to the conclusion of a conve on the topic.

65. **Mr. Vilhena de Carvalho** (Portugal) said although the notion of "international crimes of S had disappeared from the draft articles, their pri objective remained unchanged and the issues o *cogens* and obligations *erga omnes* were adequa dealt with. It was true that there was no concrete practice on the issue of crimes of State and Security Council measures had been limited to notion of threats and breaches of the peace and ha even addressed that of acts of aggression. Howev would have been difficult for the Commission n distinguish between more and less serious breach international law. Thus, replacement of the articl international crimes of State by one on se breaches of obligations under peremptory norm general international law appeared to be an accep compromise.

66. The concepts of *jus cogens*, obligations *omnes* and international crimes of State or se breaches of obligations under peremptory norm general international law were based on a con belief in certain fundamental values of internat law which, because of their importance to international community as a whole, deserved t

better protected than others. Nevertheless, each of those concepts had a different rationale and a different function. *Jus cogens* focused on the idea of a material hierarchy of norms, the superior norms being non-derogable. Obligations *erga omnes* focused on the idea of a plurality of holders of a legal interest in protection of the community. Lastly, international crimes of State or serious breaches of obligations under peremptory norms of general international law focused, at the level of secondary rules, on the consequences of an internationally wrongful act. Although the Commission could have gone further in drawing consequences from the existence of peremptory norms and obligations *erga omnes*, his delegation considered that those important issues were adequately reflected in the draft articles.

67. There was a need to take a strict approach to countermeasures, since they were liable to abuse, and that potential was exacerbated by the factual inequalities between States. The real problem with regard to State responsibility was that there was no special international body competent to determine that a violation of international law had occurred, hence the importance of considering the inclusion of provisions on the settlement of disputes in an eventual draft convention on State responsibility.

68. His delegation welcomed the recommendations made by the Commission to the General Assembly and proposed that the Assembly should take note of the draft articles in a resolution. At the same time the possibility of convening an international conference for the adoption of a convention on the topic should be kept open.

69. Turning to chapter V of the report, he welcomed any legal developments which might increase the commitment to preventive action in order to avoid harm, particularly environmental harm. While the draft articles dealt in a satisfactory manner with the question of prevention, Portugal would have liked to see included in them such matters as harm caused to areas beyond national jurisdiction, as well as an explicit reference to the precautionary principle.

70. As to the Commission's recommendation to the Assembly that it should elaborate a convention on the basis of the draft articles now adopted, his delegation would prefer the final outcome of the work on the topic to deal in an integrated manner with the questions of prevention and liability. It therefore seemed premature to engage in the drafting of a convention relating only to the first of those two aspects.

71. **Mr. Taft** (United States of America), referring to chapter IV of the report, said that it would not be advisable to attempt to adopt a binding instrument on the topic. The draft articles and commentaries had been adopted earlier that year and had only recently become available. The General Assembly should, in its resolution on the report of the Commission, take note of the draft articles and commentaries and request Governments to study them carefully.

72. His Government welcomed a number of developments in the draft articles over the past year, notably the Commission's revision of certain articles to reflect more accurately existing customary international law. More specifically, the United States welcomed the Commission's work on serious breaches, including the clarification of the scope of articles 40 and 41 and the deletion of wording that might have been interpreted to suggest that punitive damages were permissible for serious breaches. His delegation also noted with satisfaction the decisions of the Commission to set aside the provisions on dispute settlement; he remained concerned, however, at the distinction drawn between serious breaches and other breaches, a distinction not found in customary international law.

73. His delegation noted with approval the reference in the commentary on article 9 to the exceptional nature of the attribution to a State of conduct carried out in the absence or default of the official authorities and the statement in the commentary on article 36 that financially assessable damages included moral damages suffered by a State's nationals due to personal injuries. Likewise, the United States welcomed the specification in the commentary on article 47, addressing situations in which more than one State was responsible for the international wrong, that the articles should not be interpreted to provide for joint and several liability.

74. His Government continued to be concerned at the treatment of countermeasures in the articles. While welcoming the recognition of the importance of countermeasures in the law on State responsibility, his Government believed that the articles included restrictions on the use of countermeasures that did not reflect customary international law or sound practice. In particular, it remained concerned about the

requirement in article 52, paragraph 1 (b), that a State must offer to negotiate before resorting to countermeasures, despite the undesirable burden that such a requirement placed on an injured State. Similarly, article 52, paragraph 3, required that all countermeasures, including urgent ones, should be suspended once the wrongful conduct had ceased and the dispute was pending before a competent tribunal. His delegation intended to look into whether such a constraint was warranted.

75. In addition, the requirement that countermeasures must be proportional did not make it sufficiently clear that there were two types of proportionality: proportionality in respect of the injury suffered and proportionality in respect of the means necessary to induce the wrongdoing State to meet its international obligations.

76. Article 16 and its commentary failed to make it clear, first, that responsibility implied a specific intent on the part of the assisting State to aid in the commission of the wrongful act and, second, that the assistance must make a significant contribution to the commission of the act. Similarly, the commentary appeared to contain inconsistent statements regarding the degree of responsibility arising from the assistance, in other words, whether the assisting State became responsible for the acting State's wrongful act in whole or only in part.

77. His delegation was continuing to study the Commission's treatment in article 30 (b) and its commentary of assurances and guarantees of non-repetition. That area was not well developed in international practice or jurisprudence, and it was uncertain whether the Commission's approach was the correct one.

78. While noting with satisfaction that the Commission had narrowed the definition of "injured State", as reflected in article 42 (b) (ii), his Government remained concerned that the definition might still be overly broad, and it intended to consider the matter further. The same applied to the suggestion in the commentary on article 14 that an expropriation might be a continuing breach of an international obligation, and the statement in the commentary on article 18 that "serious economic pressure" might be sufficient to constitute the coercion of another State to commit an internationally wrongful act.

79. With regard to chapter V of the report, he concurred with the Commission's decision to defer consideration of the question of international liability pending completion of the work on prevention. In his delegation's view, it was preferable to conclude binding agreements in the area of environmental impact assessment on a regional or topical basis, rather than at the global level.

80. Turning to chapter VII of the report, his delegation agreed that the Drafting Committee should recast article 9 to stipulate the requirement of continuous nationality. He did not believe that the Commission should depart from customary international law in that area.

81. While the wording of article 10 on exhaustion of local remedies was generally satisfactory, his delegation believed that it could be improved by providing that the national whose claim was to be espoused need only exhaust available and effective local remedies before espousal could occur, and by reconsidering the limitation that only those remedies that were available "as of right" must be pursued. In the United States, for example, that would mean that claimants would not have to seek relief from the highest court in cases where parties could not appeal as of right.

82. Lastly, additional thought should be given to the attempt to draw a line between direct and indirect claims in article 11.

83. With regard to chapter VI of the report, the Commission had found that conditional interpretative declarations appeared to be subject, mutatis mutandis, to the same legal regime as reservations. If further work confirmed that the same rules applied to the effects of reservations and conditional interpretative declarations, it might not be necessary to include in the draft Guide to Practice guidelines specifically relating to conditional interpretative declarations.

84. With regard to late formulation of reservations, his Government had considered the text of draft guideline 2.3.1, adopted at the Commission's previous session. The United States was concerned that the adoption of a guideline on that topic would introduce an element of instability into treaty practice without creating any discernible benefit. His Government noted that, in its capacity as depositary for a large number of multilateral treaties, it had not been faced with the late formulation of reservations, and it agreed with those

members of the Commission who believed that a guideline on the subject would have the effect of encouraging late reservations.

85. If, despite the concerns expressed, the guideline was retained, the term "objection" should not be used in a sense other than the way it was used in article 20 of the Vienna Conventions on the Law of Treaties. "Rejection" appeared to be the better of the two alternatives proposed in footnote 15 to the report.

86. Concerning the role of the depositary, the Commission had asked whether a depositary might refuse to communicate to the States and international organizations concerned a reservation that was manifestly inadmissible, particularly when it was prohibited by a provision of the treaty. At an earlier stage of international law, the answer might have been yes. However, the institution of the depositary had been changed by the widespread adoption of the 1969 Vienna Convention on the Law of Treaties. The United States in its depositary capacity now would, in examining an instrument of ratification, accession, acceptance, or approval, call the attention of the State concerned to any reservation in the instrument prohibited by the treaty, not included among reservations permitted by the treaty or, in its view, incompatible with the object and purpose of the treaty.

87. If, however, a State indicated that it wished to proceed, a "difference" within the meaning of article 77 of the Vienna Convention could arise between that State and the depositary as to the performance of the latter's functions. Article 77 required the depositary to bring such a question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

88. Lastly, with regard to chapter VIII of the report, his delegation supported the efforts of the Special Rapporteur and the Commission to develop further information from States before seeking to reach any conclusions on how to proceed in that area.

Agenda item 160: Convention on jurisdictional immunities of States and their property (*continued*) (A/C.6/56/L.7)

Draft resolution A/C.6/56/L.7

89. **Mr. Mikulka** (Secretary of the Committee) said that, pursuant to paragraph 1 of the draft resolution, the General Assembly would decide that the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property should meet from 4 to 15 February 2002. The session would have two meetings per day, with interpretation in the six official languages. It was estimated that there would be 30 pages of pre-session, 60 pages of in-session and 30 pages of post-session documentation to be processed in the six languages.

90. The conference-servicing requirements, at full cost in 2002, were estimated to be $282,500. The extent to which the Organization's capacity would need to be supplemented by temporary assistance resources could be determined only in the light of the calendar of meetings for the biennium 2002-2003. However, provision was made under the relevant section for conference services of the programme budget for the biennium 2002-2003, not only for meetings programmed at the time of budget preparation, but also for meetings authorized subsequently, provided that the number and distribution of meetings were consistent with the pattern of meetings of past years. Consequently, should the General Assembly adopt the draft resolution in question, no additional appropriation would be required under section 2, General Assembly affairs and conference services, of the proposed programme budget for the biennium 2002-2003.

91. *Draft resolution A/C.6/56/L.7 was adopted.*

92. **Ms. Burnett** (United Kingdom), explaining her position on the draft resolution just adopted, noted that the title of the item remained, as before, "Convention on jurisdictional immunities of States and their property". Her delegation understood that the aim of the Ad Hoc Committee in 2002 would be to work towards an instrument acceptable to all, whether binding or non-binding, and that, accordingly, the item as inscribed did not prejudice the outcome of the Committee's work. It was on that basis that her delegation had been prepared to support the establishment of such a committee the previous year.

The meeting rose at 1.10 p.m.

United Nations A/C.6/56/SR.15

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Chairman: Mr. Lelong ..... (Haiti)

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Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*)

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01-61710 (E)

The meeting was called to order at 3.15 p.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10)

1. **Ms. Quesada** (Chile), referring to the topic "Responsibility of States for internationally wrongful acts", expressed her approval of the new title the International Law Commission had given the topic in order to distinguish that type of responsibility not only from the responsibility of the State under internal law but also from liability entailed by acts not prohibited by international law. Likewise, she welcomed the new order of the articles in Part One, in which article 7 was in its logical place following articles 4, 5 and 6. She was also pleased to note that at its latest session, the Commission had taken account of the observations which States had addressed to the Sixth Committee.

2. Turning to the question of serious breaches of obligations under peremptory norms, she said that significant progress would have been made in the development of international law if it had been possible to retain the norm embodied in former article 19, which had referred to international crimes and delicts. She had to admit, however, that that norm was perhaps too far ahead of its time to secure a consensus among States and would have led to considerable practical difficulties. For that reason she had taken note of the notion of "serious breaches of obligations owed to the international community as a whole" proposed by the Commission in 2001 to replace the distinction between crimes and delicts and since amplified by the Commission in the light of the discussion in the Sixth Committee.

3. Recalling that at the previous session of the General Assembly she had expressed a preference for the formula "international community *of States* as a whole" rather than "international community as a whole", she noted with satisfaction that reference was no longer made to the international community in the title of chapter III, which had been changed by the Commission and was now more acceptable. However, it was clear from the commentary that the Commission had *implicitly* retained the concept of "international community as a whole" in several provisions. Furthermore, the concept was *explicitly* retained in article 48 relating to the invocation of responsibility by a State other than an injured State. It was imperative that the concept of the obligation breached should refer to an obligation owed to the international community *of States* as a whole, a more precise concept which had been embodied in the Vienna Convention on the Law of Treaties.

4. Her delegation disputed the validity of the idea that a breach must be serious for the provisions of Part Two, chapter III, to take effect, despite the specific commentary in which the Commission sought to justify that idea by explaining that the word "serious" meant that a certain order of magnitude was necessary to avoid abusive recourse.

5. Such a distinction was unjustified. Any breach of a peremptory norm of general international law must be considered to be serious and to entail the responsibility of the State. The fact that Part Two, chapter III, established a distinction according to whether a peremptory norm was breached "in a gross or systematic manner" or not seriously affected the concept of *jus cogens*, since it could serve to legitimize "non-serious" breaches. Also, as other delegations had observed, that distinction was difficult to establish in practice, particularly because no authority was empowered so to do.

6. She also wondered whether the concept of a serious breach, originally developed primarily as a response to the needs of Part Two, chapter III, would not conflict with article 2, which included among the elements of an internationally wrongful act "a breach of an international obligation of the State" without in any way qualifying such breaches. Furthermore, under article 1, *every* internationally wrongful act of a State entailed the international responsibility of that State.

7. Paragraph (13) of the commentary to article 41, which stated that "a serious breach in the sense of article 40 entails the legal consequences stipulated for all breaches in chapter I and II of Part Two" (arts. 29-38), supported her delegation's view that article 40 might be misinterpreted and, as one delegation had noted, might even be interpreted in the opposite sense to mean that the legal consequences envisaged in Part Two would take effect only in the case of a serious breach.

8. Turning to article 54, and recalling the criticism prompted by its wording in the draft proposed by the Commission at its fifty-second session, she welcomed the fundamental changes that had subsequently been made. Rather than a provision on countermeasures, it

had become a saving clause recognizing that States having a legal interest in an obligation that had been breached and entitled to invoke the responsibility of another State under article 48 had the right to take lawful measures against that State to ensure cessation of the breach and reparation. As such, it was acceptable.

9. Her delegation had endorsed the Commission's decision at its previous session not to include specific provisions on dispute settlement in the draft articles. She remained convinced that the issue should be addressed in the context of a specific, detailed study rather than of a document on responsibility, where it might hinder approval and implementation.

10. Lastly, she considered that the draft articles contained a well-constructed, balanced, exhaustive and consistent text and supported the idea of recommending that the General Assembly should take note of them in a resolution, annexing them thereto. However, she stressed that the subject of State responsibility should not be abandoned and that the General Assembly should not merely take note of the draft articles, but also recommend that States should consider them carefully and keep the matter under review with a view to the conclusion of a convention in the future.

11. **Mr. Prandler** (Hungary) said he firmly believed that, once concluded, the draft articles on the responsibility of States for internationally wrongful acts would rank among the outstanding instruments and important conventions adopted by the Commission. Turning to procedural issues, he expressed support for the Commission's recommendation that the General Assembly should take note of the draft articles in a resolution and did not rule out the possibility of convening an international conference of plenipotentiaries in a few years; however, he warned against a premature decision that might unravel the compromise package that had been achieved.

12. Although Governments had not yet been able to study the Commission's report, he was not convinced that a new exchange of views would enhance the coherence and logic of the existing text. Certain articles could doubtless be improved but in the case at hand, it might be best to take the approach followed with the Convention on the Law of the Sea by considering the text as a whole to be acceptable insofar as it represented a minimum level of consensus and therefore an acceptable balance between the different points of view.

13. Thus, the real question was whether the draft articles as a whole represented a minimum level of acceptance. His delegation believed that the document reflected both generally accepted norms of customary international law and emerging rules of the progressive development of international law. To defer action on that issue by the General Assembly would not do justice to the excellent work of the Commission.

14. With respect to substantive issues and to the possibility of leaving certain issues to the discretion of a diplomatic conference, he recalled that the previous year his delegation had strongly supported the inclusion of provisions on dispute settlement in the draft articles. However, it had changed its position since the majority of delegations did not believe that such provisions would be useful; there was a plethora of other methods available for the peaceful settlement of disputes, beginning with Article 33 of the Charter of the United Nations. At the current juncture, the issue was not the establishment of machinery for the settlement of disputes in the context of the draft articles, but rather whether States had the political will to accept the existing methods, including compulsory machinery.

15. One of the major changes which had been made to the text, and which his delegation supported, was the deletion of the notion of "international crime", contained in the former article 19 of the draft articles, prompted by the acceptance of individual criminal responsibility as defined in the Rome Statute of the International Criminal Court, and based on the concept of serious breaches of peremptory norms and of obligations owed to the international community as a whole. Despite the doubts expressed by some delegations concerning the nature and actual manifestations of such serious breaches, his delegation supported the introduction of the concepts of "serious breaches" and "peremptory norms" (*jus cogens*) into the draft articles. His delegation was satisfied with the explanations and examples given in the commentary to draft article 40, and only wished to add to the list Articles 1 and 2 of the Charter of the United Nations, as well as the basic provisions of international humanitarian law and the law of diplomatic relations.

16. He drew attention to article 48, paragraph 1 (b), according to which States were entitled to invoke the

responsibility of another State if the obligation was owed to the international community as a whole. That provision was based on the "essential distinction" established by the International Court of Justice between obligations owed to particular States and those owed to the international community as a whole. The latter were obligations *erga omnes*, a term which had not been used in the draft articles so that it would not be necessary to provide a list of such obligations.

17. His delegation reiterated its conviction that the draft articles could serve as a "code of conduct" on matters of State responsibility. State practice and the practice of international organizations would endorse the most important provisions of the draft or lead to further changes. In any case, the International Law Commission and the General Assembly were making available to States an important "code of conduct" and it was to be hoped that the text would help to consolidate the rules which should be adhered to by the actors of the international community as a whole.

18. **Mr. Hmoud** (Jordan), emphasizing the considerable importance of the draft articles on the responsibility of States to the international community, expressed the hope that the text would strengthen the rule of law by establishing rules which would be clear and not arbitrary, and would constitute an authoritative source.

19. The text had been greatly improved relative to the previous draft, better reflecting the practice of States on the doctrine of "State responsibility". However, it was regrettable that the initial progressive development approach had been abandoned, since it would have strengthened the legal regime of the draft articles.

20. With particular reference to the provisions on countermeasures, he recalled that his delegation considered the legal regime on countermeasures as a safeguard against the adoption of political and arbitrary countermeasures which might undermine the principle of sovereign equality. The regime, as defined in the draft articles, could also secure compliance with international obligations and act as a deterrent to wrongdoing. It was however regrettable that there was no provision concerning unnecessary or disproportionate countermeasures which might be taken by an injured State, although it could be supposed that the dispute settlement safeguards together with the countermeasures provisions would restrict the scope for abuse.

21. Apart from minor editing changes, the main departure from the previous version of the text was the replacement of the article on "collective" countermeasures with a saving clause under article 54. Having previously expressed concern over the proportionality of countermeasures that could be taken by any State against the perpetrators of serious breaches of essential obligations towards the international community, his delegation noted that under the current saving clause, the right of "any" State to take "lawful" measures was maintained in the case of obligations *erga omnes*, and was even extended to all obligations the violation of which justified recourse to countermeasures. His delegation feared that the principle of proportionality might be undermined if any State or group of States not acting in concert would be free to take whatever countermeasures it deemed appropriate. Article 54 should therefore be deleted and the regime of collective measures should be studied and codified in the future, for the following reasons: firstly, to prevent abusive recourse to the right of retorsion; secondly, to enable a group of States to induce the State responsible for a wrongful act contrary to treaty obligations or customary international law to cease such act and repair the damage; and lastly, to deter serious violations of obligations owed to the international community as a whole by obliging the latter to take positive action when such violations occurred. Such actions were an obligation, rather than a matter for the discretion of the international community, particularly when violations of human rights or humanitarian law were concerned.

22. His delegation understood that it had been necessary to retain the concept of *actio popularis* in articles 41 and 48, in the light of the deletion of the former article 19 on State crimes. However, given the complexity of that concept, which might prejudice general acceptance of the draft articles, a definition of the act might not be necessary, provided that its elements and consequences were codified in a sufficient and effective manner.

23. Noting that the draft articles now referred to serious breaches of peremptory norms of international law, he agreed that there was substantial overlap in judicial decisions and in the writings of jurists between obligations *erga omnes* and the rules of *jus cogens*. To the extent that that was also true in practice, his delegation accepted the replacement of obligations *erga omnes* by the rules of *jus cogens*.

24. The reference in chapter III to the regime of *actio popularis* was necessary, taking into account the deletion of the reference to international crimes of States and the need to set out the consequences of serious breaches in terms of obligations incumbent on States rather than States' prerogatives, especially if the aim was to bring an end to the breach and to restore legality. Furthermore, article 41 did not call into question the competence of the Security Council with respect to maintaining international peace and security, since article 59 specified that the draft articles were without prejudice to the Charter of the United Nations; indeed, article 41 could prove particularly useful if the Council decided not to intervene.

25. His delegation considered that the invocation of responsibility by a State other than an injured State (art. 48) should not be confused with the "consequences" of a serious breach of a peremptory norm (art. 41) because their legal effects were different, albeit not contradictory. The regimes referred to in the two articles coexisted, even when the wrongful act leading to the application of the two articles was the same.

26. Noting the deletion of the reference in article 41 to aggravated (or punitive) damages, which, in his opinion, could have acted as a deterrent, he said that he recognized that confining damages to those that were compensatory in nature had undoubtedly facilitated the general acceptance of the draft articles.

27. He supported the compromise reached by the Commission on dispute settlement, whereby the issue would be dealt with in the General Assembly decision concerning the form of the draft articles. If the Assembly decided to adopt a convention, it would have to provide for the establishment of a mechanism to settle disputes arising in the application or interpretation of those provisions.

28. Although his Government supported the adoption of an international convention, it was ready to accept the solution proposed by the Commission, consisting in the adoption by the General Assembly of a resolution taking note of the draft articles, the text of which would be annexed to the resolution, and the subsequent convening, at the earliest opportunity, of an international conference to adopt the draft articles in the form of a convention. Whether they were adopted in an annex to a resolution or took the form of a convention, the draft articles should be authoritative in the area of State responsibility. In conclusion, he mentioned instances in which the draft articles had already been quoted. In that connection, it was encouraging to note that they had already been invoked before the International Court of Justice in the *La Grand* case.

29. **Mr. Kittichaisaree** (Thailand) expressed satisfaction that the draft articles on State responsibility reflected fairly the views of Governments and members of the Commission, and customary international law. He welcomed the change in the title from "State responsibility" to "Responsibility of States for internationally wrongful acts", which removed from the scope of application of the text the responsibility of States under internal law.

30. His delegation generally supported the draft articles and appreciated, in particular, the precision with which the conditions for recourse to countermeasures were defined. It was concerned, however, about the vagueness of the concept of obligations "owed to the international community as a whole"; it was to be hoped that, in time and as a result of State practice, the meaning of the concept would be clarified.

31. Regarding the replacement of article 54 (Measures taken by States other than an injured State) by a saving clause, his delegation regretted the lack of specificity of the provisions relating to the nature and scope of "lawful measures", a problem that was supposed to be solved with the development of international law, and it was concerned about the possible abuse of such measures.

32. He welcomed the changes made to part two, chapter III, especially in the light of the absence of a reference to "international crimes of States". Thus, the decision to retain only serious breaches of obligations under peremptory norms of general international law was welcome, although the concept of "serious breaches" was somewhat vague and open to different interpretations. Finally, the deletion of article 42, paragraph 1, was appropriate because the concept of "punitive" damages was not recognized in international law.

33. His delegation was concerned about the lack of provisions on dispute settlement, the inclusion of which in the draft articles should not be left to the discretion of an international conference that might or might not be convened. There was a need to refer to the

obligation to settle disputes by peaceful means, in accordance with Articles 2 and 33 of the Charter of the United Nations, or to revert to the mechanism proposed on first reading.

34. He reiterated his opposition to the continuation of the negotiations on the draft articles in the context of a diplomatic conference, which could last several years and undermine the compromises reached, without facilitating the ratification of the text. Consequently, he supported the Commission's recommendation that the draft articles should be adopted and included in a General Assembly resolution in order to expedite their entry into force in relations between States.

35. **Ms. Cavaliere de Nava** (Venezuela), addressing the first topic, "Responsibility of States for internationally wrongful acts", said that the work of the Commission should result in the conclusion of a convention. She was not opposed to the proposal that the draft articles should be approved and annexed to a General Assembly resolution, provided that the proposal was part of a process leading to the adoption of a treaty.

36. In general, her delegation considered that the draft articles prepared by the Commission were acceptable, as the right balance had been struck between customary law, international practice and the development of international law and international relations; the Commission had produced a text whose value had already been recognized not only in the writings of jurists but also in a juridical context, since international tribunals had already referred to it.

37. Commenting on various aspects of the draft, she emphasized the importance of part three, chapter II; the principle that countermeasures might be justified had been recognized by States and by international tribunals, and the formulation of precise and balanced rules on the subject would help to ensure judicious recourse to such measures and prevent the ever-present risk of abuse. The purpose of countermeasures was not to punish the wrongdoing State but to induce it to comply with the obligation that had been breached. The Judgment of the International Court of Justice in the *Gabčikovo-Nagymaros Project case* was clear: an injured State could resort to countermeasures, only in reaction to a wrongful act and the countermeasures must, moreover, be adapted to the circumstances.

38. The possibility for an injured State to take countermeasures against the responsible State in order to induce it to comply with its international obligations should be subject to the obligation of proportionality and to the conditions enumerated in draft article 52. Moreover, that possibility disappeared as soon as the breach of the international obligation had ceased or when the dispute was submitted to an international court or tribunal, notwithstanding the provision relating to the preservation of the rights of the injured State set forth in article 50, paragraph 2, since that could be ensured in the framework of the judicial procedure relating to the dispute. In that connection she welcomed the exception contained in paragraph 4, which envisaged cases in which the injured State failed to implement the dispute settlement procedures in good faith.

39. Part two, chapter III dealt usefully with serious breaches of obligations under peremptory norms of general international law; in particular, articles 40 and 41 rightly took up the distinction between obligations *erga omnes* and specific obligations established by the International Court of Justice in the *Barcelona Traction* case. The draft articles should confirm that any State was entitled to invoke the responsibility of another State in the event of a breach of an obligation owed to the international community as a whole as indicated in article 48, paragraph 2.

40. Turning to the topic "Reservations to treaties", she reaffirmed that conditional interpretative declarations were similar to reservations, in particular with respect to their effects, and therefore came under the Vienna regime. For that reason, conditional interpretative declarations had no place in the Guide to Practice on which the Commission was currently working.

41. One of the more complex questions considered by the Commission in that context concerned the late formulation of reservations, dealt with in draft guideline 2.3.1, which provided that, in accordance with the principle *pacta sunt servanda* and the principle of the stability of legal relations between States, a State or international organization could not formulate a reservation to a treaty "after expressing its consent to be bound by the treaty", except "if none of the other contracting Parties objects to the late formulation of the reservation". Although that rule had been recognized in the 1969 and 1986 Vienna Conventions and in judgments of the International Court of Justice, in particular in the *Border and Transborder Armed Actions* case, it had no public

policy value in that the States parties to a treaty could make exceptions to it. The Commission had therefore performed a useful task by developing a guideline along those lines. Moreover, the word "objects" used in draft guideline 2.3.1 was particularly appropriate in that it related not only to the substance of the reservation but also to the date on which it was formulated.

42. The functions of a depositary, which were the subject of articles 77 and 78 of the 1969 Vienna Convention, were to communicate to the other parties any reservation formulated or submitted by a State, and it was for the parties to determine whether such reservation was admissible or not. The depositary therefore performed essentially an information function rather than a decision-making function.

43. The term "formulation" was used in the context both of reservations and interpretative declarations and of unilateral acts of States, but in the context of interpretative reservations and declarations, "formulating" a reservation did not necessarily imply that the reservation would have legal effects, since the other contracting Parties might object to it. In the case of unilateral acts of States, the Commission used the word "formulate" in a different sense. Indeed, a State that formulated a unilateral act was thereafter bound by the obligation thus created, subject to certain conditions, without it being necessary for that purpose that the addressee or addressees of the act in question should react. In that context, therefore, there was a close link between "formulation" and the production of legal effects.

44. The meaning of the word "formulate" did not therefore appear to be the same in the context of reservations or in that of unilateral acts. In order to avoid confusion, it would be advisable to revise the terminology employed by the Commission with a view to achieving greater coherence and clarity.

45. As for unilateral acts of States, although the work of the Commission was not proceeding as swiftly as it should, progress had nonetheless been made in considering such fundamental questions as the definition and classification of such acts, the organization of the draft articles and so on.

46. In organizing the draft articles, efforts should be made to classify unilateral acts on the basis of criteria such as content and legal effects. Without adequate classification, the development of rules in that connection would be impossible.

47. Her delegation believed that it should be possible to establish common rules concerning the definition, formulation and interpretation of unilateral acts. The same did not apply, however, to their legal effects, in view of the diversity of such effects.

48. Notwithstanding the Commission's unsuccessful attempts to reach final conclusions on that subject, it should still be able provisionally to develop a classification based on the criterion of legal effects that would allow it to organize the draft articles in a satisfactory manner and thus move forward.

49. In order to formulate general rules, it was clearly essential to be aware of State practice. The Commission, however, had not received the necessary information in that connection, and she therefore hoped that Governments would in future respond to any questionnaires sent to them, particularly that compiled by the Commission in 2001 and circulated by the Secretariat some weeks earlier.

50. Her delegation would in due course communicate its views on international liability for injurious consequences arising out of acts not prohibited by international law (in particular prevention of transboundary harm from hazardous activities) and on diplomatic protection.

51. **Mr. Bocalandro** (Argentina), speaking on agenda item 162, said he approved of the manner in which the Commission had sought and taken into account the views and recommendations of States with the aim of formulating the draft articles on Responsibility of States for internationally wrongful acts; its approach had not only promoted general acceptance of the draft articles and their commentaries but had also enhanced their quality and usefulness. With reference to the significant improvements and amendments made to the draft articles on second reading, in particular the provisions relating to the invocation of international responsibility, he welcomed the change of attitude adopted vis-à-vis the responsible State. As a result, the draft articles now attached greater importance to the right of a State to invoke responsibility and established a distinction between the injured State and other States having a legitimate interest in exacting performance of the obligation breached, thus further clarifying the rules applicable to the invocation of responsibility and rendering them more coherent.

52. He also approved of the manner in which the Commission had dealt with the question of serious breaches of obligations under peremptory norms of general international law. In that connection, he was also pleased to note the Commission's reaffirmation that the principles of *jus cogens* contained in the 1969 Vienna Convention on the Law of Treaties formed the basis of the modern international legal order. Inclusion of the idea of serious breaches and their consequences was a first major step towards greater recognition and protection of the higher values and interests of the international community as a whole. In future, that idea would certainly benefit from further development and strengthening, in view of the increasing integration of international society and its ensuing need for more effective jurisdictional instruments aimed at promoting respect for law in general.

53. Concerning the delicate issue of countermeasures, his delegation remained firmly convinced that such measures should be taken only in exceptional circumstances with the sole aim of ending a breach of obligation and guaranteeing reparation. In that regard, he endorsed the rules proposed by the Commission, which were balanced and conducive to limiting any resort to countermeasures, as well as to preventing any abuse. He also welcomed the decision not to incorporate into the draft articles the idea of collective countermeasures.

54. Lastly, he shared the Commission's view that the draft articles should first form the subject of a resolution to be adopted by the General Assembly at its current session in which it would note with satisfaction the excellent work achieved by the Commission. The resolution would also include the draft articles as an annex and recommend that Member States should consider them and, together with the institutions concerned, disseminate them as widely as possible with the aim of increasing knowledge and understanding of their content and promoting their application in international practice and in case law. Secondly, as proposed by the Commission and as the General Assembly should request in its resolution, consideration should be given to transforming the draft articles into a convention to be adopted at a future diplomatic conference on codification. To that end, the topic should remain on the agenda of the forthcoming sessions of the Committee, which should closely monitor the impact of the publication of the draft articles in the Member States and ascertain that conditions were right for the convening of the said conference.

55. **Ms. Čačić** (Croatia) said that international law was not a static phenomenon; in the area of State responsibility, the focus was now more on the collective interest and the protection of certain values shared by the international community as a whole, imposing obligations *erga omnes*, whereas earlier it had concentrated on the protection of strictly bilateral rights and duties. The Commission had recognized that shift, particularly within the context of article 48, which dealt with the obligations owed to the international community as a whole.

56. It had been claimed that the formulation of the draft articles involved not only codification, but also the progressive development of law. It was clearly impossible to codify law without some reinterpretation and restructuring, but the Commission had stayed on the side of codification. Some concepts, such as the concept of State crimes, which was too new and controversial, had been abandoned, while others, such as countermeasures, had been re-examined and streamlined, and the result was a well-balanced and well-defined text which accurately reflected the current status of international law, and commentaries which would be a valuable tool for the interpretation and implementation of the articles.

57. With regard to the form of the draft articles, her delegation endorsed the two-step approach recommended by the Commission, which had already been used in the case of the articles on the nationality of natural persons in relation to the succession of States. The General Assembly should take note of the draft articles in a resolution to which the draft articles would be annexed. That would be the simplest way of giving the draft articles the necessary recognition and publicity, while avoiding the risks of decodification that a premature formulation of a convention could entail, and the risk of the overall balance of the text being compromised by diplomatic negotiations. Eventually, the draft articles would have to be adopted in the form of an international convention, since they were a cornerstone of international law and should therefore be adopted in that form. They would then have binding force and would have a stabilizing influence on customary international law, like the Vienna Convention on the Law of Treaties.

58. Meanwhile, Governments and international judicial bodies should continue the process of endorsing and testing the draft articles and putting them into practice.

59. **Ms. Connelly** (Ireland) said that the draft articles were an important contribution to the codification of international law and also contained elements of progressive development for the guidance of States. Her delegation welcomed the draft articles but wished to make a few comments with a view to the future.

60. With regard to serious breaches of obligations under peremptory norms of general international law, her Government was pleased that its written observations had been taken into account by the Commission and that the concept of an international crime, which State practice did not support, had been replaced by that of a breach of an obligation to the international community as a whole. However, it had some doubts about the final text of part two, chapter III, which referred to "serious breaches of obligations under peremptory norms of general international law" rather than breaches of obligations to the international community as a whole. All breaches of peremptory norms of general international law were by their very nature serious. Furthermore, reference was made elsewhere in the draft articles to breaches of obligations owed to the international community as a whole without clarifying the relationship between those breaches and the breaches referred to in part two, chapter III. Thus, under article 48, any State was entitled to invoke the responsibility of another State which had breached an obligation owed to the international community as a whole and to claim from that State the cessation of the internationally wrongful act and assurances and guarantees of non-repetition as well as the performance of the obligation of reparation. Yet part two, chapter III did not explicitly deal with the invocation by any State of the responsibility of another State for a serious breach of an obligation arising under a peremptory norm of general international law. The commentary seemed to imply that breaches of obligations owed to the international community as a whole included breaches (whether serious or not) of obligations under peremptory norms of general international law and that in the latter instance, any State could invoke cessation and claim guarantees. If that interpretation was correct, the rule should be made explicit, and not implied from a reading of separate provisions. Since they were in different parts of the text, the articles could be interpreted to mean that different legal regimes were meant to operate depending on the type of breach. It would be worth giving further thought to the relationship between the responsibility of States flowing from breaches of obligations under peremptory norms and those flowing from breaches of obligations owed to the international community as a whole.

61. Turning to the subject of countermeasures, she said that the aim was to allow States to defend their rights, yet subject to conditions which prevented abuse. Any decision to take countermeasures was by its nature unilateral, the wronged State being solely empowered to adjudge the acts of another State, its responsibility, the applicable law, and the appropriate response; it was important that limits should be placed upon such power. In that regard, her delegation considered that chapter II of Part Three provided realistic standards for States to follow. However, her delegation regretted the absence of an explicit reference to the need to protect third parties from any adverse effects of countermeasures taken against a wrongdoing State. Paragraph 1 of article 49 provided that an injured State might take countermeasures against a State which was responsible for an internationally wrongful act only in order to induce that State to comply with its obligations. The restriction applied as much to the target of the countermeasures as to their purpose: countermeasures must not be directed against States other than the responsible State. In a situation where a third State was owed an international obligation by the State taking the countermeasures and that obligation was breached by the countermeasures, the wrongfulness of the measures was not precluded as against the third State. In its commentary, however, the Commission recognized that countermeasures might incidentally affect the position of third States or other third parties. If such indirect effects could not be entirely avoided, the law, at least by way of progressive development, should surely seek to minimize such negative effects. The addition of a provision to that effect in the draft articles would conform to the spirit of Article 50 of the Charter of the United Nations, which enshrined the principle that third parties must be protected from the indirect effect of measures taken against other States.

62. Finally, with regard to the form the draft articles should take, her delegation was of the opinion that rather than proceeding in the direction of codification,

Member States should reflect on the draft articles and incorporate the progressive elements in their own practice or not as they deemed appropriate. In fact, the process necessary for the adoption of a convention might run the risk of weakening the balance struck by the Commission and would entail the reopening of the debate on a number of complicated and sensitive issues that had been settled with great difficulty. She therefore felt that the General Assembly should take note of the draft articles in a resolution to which the draft articles would be annexed. That resolution might, however, be worded in more positive terms, with the General Assembly taking note with appreciation of the draft articles and commending them to Member States for their consideration. Her delegation considered that the draft articles should be adopted by the end of the year. As for the decision to convene an international conference of plenipotentiaries to consider the draft articles with a view to concluding a convention, that should be a decision for another day.

63. **Mr. Krokhmal** (Ukraine) said that the responsibility of States for internationally wrongful acts was a topic of the utmost importance, which had been significantly furthered by the well-balanced and well-structured provisions of the draft articles presented by the Commission. However, it would be premature to discuss the issue of convening a conference to consider the adoption of the draft articles in the form of a convention at the present stage. Time should be given for States to examine them in depth and for international practice to develop. The topic of the responsibility of States for internationally wrongful acts should therefore be placed on the agenda of the General Assembly at its next session and should be considered on that occasion, taking into account comments made in the meantime by Member States. To that end, his delegation was prepared to support the adoption of a General Assembly resolution to which the draft articles would be annexed.

64. Diplomatic protection and reservations to treaties were also topics of great importance to his delegation, which hoped that the Commission's work on them would lead to the adoption of instruments of codification which were based on international practice and whose correctness was universally recognized. In that connection, one of the most controversial aspects of diplomatic protection was its relationship to the protection of human rights. Of course, in the case of gross violations of human rights guaranteed by *erga omnes* rules of international law, the State of nationality and other members of the international community had the right to intervene. But in other cases there had to be an injury, in other words an internationally wrongful act for which it had not been possible to obtain satisfaction through domestic legal remedies. Ignoring that rule of customary international law would amount to questioning the very bases of diplomatic protection, which was not primarily a human rights instrument.

65. His delegation believed that the threat or use of force should not be regarded as lawful means of diplomatic protection, and the same was true of reprisals, retortion, severance of diplomatic relations and economic sanctions. So-called humanitarian intervention was sometimes no more than a pretext for an abuse of the use of force. Diplomatic protection should be the initiation of a procedure for peaceful settlement of a dispute, and the use of force was only justified in legitimate self-defence. Any other interpretation would cast doubt on the basic principles of international law set forth in the Charter of the United Nations.

66. Diplomatic protection should never be confused with the right to use force in defence of the rights of nationals. Rather, it was a State prerogative recognized under international law, which a State might exercise or not, at its discretion, on behalf of its nationals. By nationals should be meant the persons who had acquired the nationality of a State in accordance with its national law.

67. His delegation believed that the effective link concept should be based on birth, descent or naturalization but not on habitual residence. The concept was relevant only between two or more States which might exercise diplomatic protection on behalf of a national, not of a mere resident. It would be helpful if the Commission could define the concept of an effective link more precisely to avoid ambiguity.

68. Lastly, neither the 1951 Convention relating to the Status of Refugees nor the 1961 Convention on the Reduction of Statelessness said anything about requiring States to exercise diplomatic protection on behalf of refugees or stateless persons, and it was difficult to envisage the circumstances under which such an obligation might be imposed. According diplomatic protection to those categories of persons would place an additional burden on States.

69. On the subject of reservations to treaties, Ukraine, as a contracting Party to the 1969 and 1986 Vienna Conventions on the Law of Treaties, supported the traditional interpretation of those conventions whereby late reservations, alternatives to reservations, interpretative declarations and modification of reservations could not be considered reservations in the sense of articles 19 to 23 of the 1969 Vienna Convention. Moreover, modifications to reservations that did not constitute a withdrawal or partial withdrawal should be considered new reservations requiring the acceptance of the contracting Parties.

70. With reference to the decision of the Secretary-General to extend the 90-day period in which the parties could object to late reservations or modifications of reservations and to make it 12 months, his delegation felt that the practice must be compatible with articles 77 and 78 of the 1969 Vienna Convention, unless the treaty provided otherwise, and the absence of an objection formulated by Ukraine to such reservations in the above-mentioned period should not be interpreted as its tacit consent.

The meeting rose at 5.10 p.m.

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Chairman: Mr. Lelong ..... (Haiti)
later: Mr. Marschik (Vice-Chairman) ..... (Austria)

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Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*)

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01-61783 (E)

The meeting was called to order at 10.20 a.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10 and Corr.1)

1. **Mr. Biato** (Brazil) said that the significance of the Commission's completion of its work on responsibility of States for internationally wrongful acts could hardly be overstated. The draft articles, which provided a guideline for the continuing development of international law, sought to occupy the middle ground in the debate concerning the nature of obligations that accrued between States in response to the growing need for accountability to the international community as a whole. It was commendable that the Commission's work had taken account of the most recent comments by States, thus earning the draft widespread support.

2. On the question whether countermeasures should have a place in the draft articles, his delegation shared the doubts expressed by others, since State responsibility should surely be limited to reparation and the cessation of wrongful acts. It must be acknowledged, however, that, as reflected in article 22 and confirmed by the International Court of Justice in the *Gabčikovo-Nagymaros Project* case, lawful countermeasures precluded wrongfulness. If recourse to the practice could not be totally ruled out, therefore, the crucial issue remained of how injured States could defend their rights against the risk of abuse if adequate guarantees were not given. While there were necessarily limits to the degree of regulation that was possible in the absence of internationally sanctioned procedures and mechanisms, greater delimitation could nonetheless be achieved. His delegation attached great importance to the criteria for avoiding abuse, including the principle of proportionality. The omission of previous references to the right of a State other than the injured State to take countermeasures was also welcome. On the other hand, the criteria concerning urgency and the absence of good faith in resort to dispute settlement remained too subjective. His delegation would also have liked to see a more direct reference to the obligation of States to seek the peaceful settlement of disputes, as set out in Articles 2 and 33 of the Charter of the United Nations.

3. Equally important was the fact that the draft provided that countermeasures must not affect human rights or humanitarian law or involve recourse to the threat or use of force. In other words, countermeasures, if adopted at all, must not be punitive but simply seek to re-establish respect for the law. Ultimately it would still be for the injured State to assess the situation. That underscored the need both for effective mechanisms whereby other States and international organizations could scrutinize the application of countermeasures and for greater acceptance by States of binding jurisdiction.

4. The Commission had rightly left the issue of collective countermeasures for future development. While appreciating the distinction between an injured State and a State with a legal interest in the performance of an obligation, his delegation doubted whether the measures adopted by third States should be considered a matter of State responsibility. On the other hand, it would have welcomed greater guidance, in article 59, on whether the imposition of sanctions by an international organization should result in the immediate suspension of countermeasures on the part of individual States.

5. With regard to the difficult issue of international crimes, the draft articles referred, in a spirit of compromise, to the existence of "peremptory norms" and "obligations owed to the international community as a whole", thus reflecting the general recognition that the violation of *jus cogens* norms must not go without consequences. The text left open, however, the question of the definition of a serious breach and, just as importantly, who would decide in a given case. There was, after all, no agreement on a precise objective procedure for dealing with either question. The difficulty of establishing a clear distinction between peremptory norms and obligations owed to the international community as a whole justified the Commission's prudence on the issue of collective countermeasures. His delegation endorsed the decision to leave article 54 largely as a saving clause, reflecting the understanding that *jus cogens* obligations entailed the duty of non-recognition. That was clearly a field which should be left to the future development of the law.

6. With regard to the ultimate form of the draft articles, his delegation considered that, although they would undoubtedly become the most authoritative statement on the question of State responsibility, the most fitting outcome of half a century's labour would be their adoption as an international convention. In view of the concerns expressed about the need to

ensure that States had adequate time to evaluate and consider the text, however, his delegation was open to the suggestion that the General Assembly should adopt a step-by-step approach. The draft articles should thus be attached to a resolution containing a recommendation that as of 2002 an international convention should be negotiated on the basis of the finished text. He added that, with its well-known preference for the conventional format, his delegation would have preferred the draft articles to have included provisions on the peaceful settlement of disputes.

7. **Mr. Momtaz** (Islamic Republic of Iran) said that the draft articles constituted an unprecedented exercise in the codification and progressive development of international law. The commentary, too, which was furnished with examples of State practice and international jurisprudence, was of both practical and academic value.

8. He wished to draw attention to a number of points arising out of the draft articles. First, in attributing conduct to a State, article 8 established a distinction between the conduct of a person and that of a group of persons. In the first case, for the conduct to be attributable to the State, the person had to have acted on the State's instructions. In formulating the provision, the Commission had merely adopted the position of the International Court of Justice in the 1986 *Military and Paramilitary Activities in and against Nicaragua* case, where the Court had ruled that, for the conduct to give rise to legal responsibility of the United States, it would have to be proved that that State had "directed or enforced" the perpetration of the act concerned; and that had not been established. By contrast, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadić*, had accepted the criterion of effective control in the case of individuals acting alone but rejected it in relation to conduct of a group of persons. In such a case, the Chamber had held, it was enough in order to attribute responsibility to a State, for that State to exercise overall control over the Group. The Commission had opted for the Tribunal's criterion in preference to the criterion of "effective control" laid down by the International Court of Justice in the *Military and Paramilitary* case.

9. The Court had, as its President had informed the Commission in 2000, been disappointed by the Tribunal's decision. He had said that the fragmentation resulting from the Tribunal's judgement would lead to anarchy and chaos in international law. In fact, the point at issue in *Prosecutor v. Tadić* was not State responsibility at all but rather individual criminal responsibility, which was expressly excluded from the scope of the draft articles on State responsibility. It might therefore have been wiser for the Commission to have followed the jurisprudence of the Court in a case which had been directly related to State responsibility.

10. Secondly, the expression "serious breach of an obligation arising under a peremptory norm of general international law" had been formulated to replace the concept of State crimes, which had been the object of lively controversy in the Commission over the past few years. The reformulation had proved a most happy and welcome compromise. Equally, he welcomed the omission of any reference to punitive damages among the particular consequences of such a breach. The existence of such damages in positive international law was not confirmed in article 42 and to have included it would have raised considerable difficulties. Effectively, there was a very limited range of possible consequences: the obligation on States to cooperate to bring the breach to an end through lawful means, not to recognize the resulting situation as lawful and not to render aid or assistance in maintaining that situation. Clearly, other consequences would emerge with the further development of international law. It was most welcome that the draft article expressly referred to such an eventuality.

11. Some concern had been aroused by the Commission's work on countermeasures. It was legitimate to ask whether an exercise in codification in that area would not appear to be legitimizing countermeasures, which were an archaic practice that inevitably worked to the advantage of powerful States. Moreover, far from encouraging wrongdoing States to resume the path of legality, countermeasures generally poisoned relations between the injured and the responsible States, making them still more intransigent and thus impeding dispute settlement mechanisms. At a time when international society was better organized and the Security Council had been revitalized, recourse to countermeasures should be subject to strict regulation, and that had been the line adopted by the Commission. It must be said, however, that the proposed regime of countermeasures was not as rigorous or restrictive as might have been hoped.

12. It was regrettable that it was left to the State taking the countermeasures to determine whether an act

was unlawful. A party to the dispute could not also be the judge. Since it was essential to make sure that an internationally wrongful act had been committed, some in the Commission had striven to establish a link between countermeasures and the compulsory settlement of disputes. Countermeasures would then be taken only when validated by an independent and impartial tribunal. In that context, he welcomed the fact that article 52 prohibited States from taking countermeasures if the dispute, or potential dispute, in question was pending before a court or tribunal with the authority to make binding decisions. He wondered why a similar prohibition had not been extended to cases where the parties were subject to a compulsory dispute settlement procedure.

13. Countermeasures should also be reversible, enabling the parties to engage in dialogue, as reflected in the ruling of the International Court of Justice in the *Gabčikovo-Nagymaros Project* case. For countermeasures to be reversible, they should obviously not inflict serious or irreparable damage on the responsible State. Article 50 addressed that concern, but his delegation considered that more obligations should be added to the list of those that should not be affected by countermeasures; the article should prohibit any measures of economic or political constraint affecting self-determination, territorial integrity or even the political independence of the target State. The draft articles adopted on first reading had taken that concern into consideration.

14. His delegation welcomed the fact that the protection of fundamental human rights appeared in the list of obligations that should not be affected. It was generally agreed that the right to be free from hunger was a fundamental human right, as stated in the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. On that basis, countermeasures that barred access to markets by a responsible State for which exports were the principal source of income should be prohibited.

15. Article 54 used the expression "lawful measures" instead of the word "countermeasures". The distinction was commendable, since the result was that only the injured State had the right to resort to countermeasures. That had been the approach adopted by the International Court of Justice in the *Military and Paramilitary* case. The Court had also rejected claims by some States to be exercising a so-called "*actio popularis*" on behalf of the international community, even though they had no mandate. The Commission had not, however, established a criterion to distinguish between countermeasures and "lawful measures", so there was still a risk of the procedure being abused.

16. With regard to the Commission's recommendation that the General Assembly should adopt the draft articles in the form of a resolution, he noted that in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* the International Court of Justice had ruled that General Assembly resolutions, while not binding, could have a normative value and could, in some circumstances, be important factors in establishing the existence of a rule or the emergence of an *opinio juris*. That would be the status enjoyed by the draft articles on State responsibility if they were adopted by consensus. It was to be hoped that they would at a later stage be adopted at a plenipotentiary conference in the form of a binding international convention. Meanwhile, they would be subjected to the test of State practice and international jurisprudence to establish whether they were acceptable to the international community as a whole.

17. **Mr. Špaček** (Slovakia) said that, at the end of its current quinquennium, it was gratifying to note that the Commission had been able to complete its work on three of the topics on its agenda. That was a remarkable achievement. The most important of the three, however, was State responsibility: the draft articles completed by the Commission filled a major gap in the codification of international law. They constituted a well thought out exposition of mostly customary international law with some proposals for its progressive development. The proposals were not radical or revolutionary; rather, they discerned the main trends of the possible future evolution of the international legal system. The commentaries, which drew heavily on State practice and the jurisprudence of international courts and tribunals, were most useful.

18. The Commission had been wise to abandon the controversial notion of State crimes. The alternative formulation of "serious breaches of obligations under peremptory norms of general international law" was far more satisfactory, since such norms, which were intended for the protection of the fundamental interests of the international community, enjoyed a very high status and any serious breach entailed particularly serious consequences. Although article 41 might seem

rudimentary, it allowed for the future development of international law.

19. His delegation supported the Commission's decision to retain a separate chapter on countermeasures, which were part of State practice and had been recognized as an institution of international law by the International Court of Justice. It was better to have the conditions relating to countermeasures clearly spelled out than to leave them in the grey area of customary international law.

20. The reason for the Commission's decision not to include provisions for dispute settlement machinery was understandable. If the draft articles were eventually adopted as a convention, it would be wiser to deal with compulsory dispute settlement procedures in an optional protocol to that convention than in the convention itself. The fact that only 64 States — one third of the Organization's membership — had so far recognized the compulsory jurisdiction of the International Court of Justice, and, that several of them had made substantial reservations, clearly demonstrated that the inclusion of such procedures in the convention itself would not guarantee wider ratification of or adherence to it.

21. Since the Commission had, rather unusually, consulted extensively with States on the text provisionally adopted by the Drafting Committee and since more than 40 delegations had spoken and 14 had sent written comments, with the result that some outstanding issues had been resolved, his delegation did not consider it useful to embark on another round of comments. On the contrary, the text should be left as it was for some years and its impact on State practice should be observed to see whether States relied on it in their relations with other States and whether international courts used it, referred to it, or, perhaps, expressed disapproval of some aspect of it. The General Assembly should adopt the Commission's recommendation. Later — perhaps in five years — it could return to the topic and, if appropriate, consider convening a diplomatic conference to adopt the text as a convention.

22. *Mr. Marschik (Austria), Vice-Chairman, took the Chair.*

23. **Mr. Lavalle-Valdes** (Guatemala), expressing appreciation of the Commission's work on State responsibility, said that some of the draft articles called for either formal or substantive changes. In article 2, following the word "when", he suggested the insertion, between commas, of the phrase ", in the absence of any of the circumstances precluding wrongfulness according to chapter V of this Part".

24. In article 10, it might be appropriate to restore paragraph 1 of article 14 of the text adopted on first reading. He agreed with the observations of the representative of Australia on the current wording of article 10. Paragraph 1 did not seem to apply to movements other than insurrectional ones, although there seemed no reason why such a movement could not achieve control of the entire territory of a State and then establish a new State. In paragraph 1, the words "or other" should therefore be inserted after "insurrectional".

25. In article 15, paragraph 1 would express the intention of its authors better if the phrase "defined in aggregate as wrongful" were replaced by "which has to be considered in aggregate as wrongful".

26. Article 18 (a) implied that a coerced State was not responsible for its acts while under coercion. That need not be said in article 18, because of the provision in article 23, but there should be a provision to the same effect in chapter V of Part One.

27. In article 49, paragraph 3, the final words "the resumption of performance of the obligations in question" should be replaced by "the subsequent performance or resumption of the obligations in question", to take account of obligations, such as the surrender of specific items, which could be performed immediately. The article should also contain an express prohibition of countermeasures involving intervention in the external or internal affairs of States, on the lines of the prohibition against "intervention in the domestic jurisdiction" of the responsible State found in the former draft article 50.

28. Article 42 (b) (ii) seemed to apply only in the context of treaty law. If so, the provisions of article 55 made it unnecessary and it could be deleted. In the latter article, the words "or circumstances precluding wrongfulness" should be inserted after "existence", to reflect the applicability to treaties of the rule of *inadimplenti non est adimplendum*, which was part of *lex specialis*.

29. Turning to substantive issues arising from the draft articles, he said that the rules in articles 16, 17 and 18 were really primary rules, though presented as

secondary ones, and he wondered whether the chapter in which they appeared (chapter IV) should be retained at all. Moreover, if the chapter was intended to cover the whole of the subject indicated by its title, it should contain a rule on the effects of a guarantee given by one State for the international obligations of another. The conditions in articles 16 and 17 governing the wrongfulness of an act of a State did not seem entirely satisfactory. He could imagine a situation in which a wrongful act was perpetrated against State C by State B, a State assisted or directed and controlled by State A, and in which paragraph (a) of both articles would apply but not paragraph (b). Assuming the actions of State A to be completely free and unconstrained by the need to comply with any rule of international law, State C would be unable to invoke the responsibility of State A; it would merely be able to claim that the latter's conduct was unfriendly, and might well break off diplomatic relations with it. That might lead to a situation such as that contemplated in Article 34 of the Charter of the United Nations, and ultimately to a threat to peace. He also found it unacceptable that, according to article 16, a State which aided or assisted another State in the commission of an internationally wrongful act could be exempt from responsibility if the breach of international law committed by the State benefiting from the aid and assistance could not have taken place without it. In such a case, the State providing the aid and assistance would be the co-author of the breach, according to article 47 and paragraph (10) of the commentary to article 16. However, that did not seem compatible with the provisions of either article 2 (b) or article 13.

30. With regard to article 48, which provided for the invocation of responsibility by a State other than an injured State, unless the State invoking responsibility was doing so as the proxy of the injured State, which seemed highly improbable, the procedure in question would be a kind of *negotiorum gestio*. However, it might be wise to limit it to cases in which the injured State, without losing its right to invoke responsibility under article 45, was not in a position to do so.

31. As for the form the draft articles should take, he queried whether the Commission's recommendation, in paragraphs 72 and 73 of its report, meant that the observations made by delegations in that connection would be disregarded. They could certainly be taken into account by a conference of plenipotentiaries, if one was held for the purpose of adopting a convention. However, it would seem more appropriate for the Committee to continue year by year its study of the proposals made, and for a conference to be convened once consensus was achieved. Such a procedure, though unorthodox, would ensure maximum efficiency. In that light, he supported the proposal by the representative of Mexico that the General Assembly should confine itself to noting with appreciation the work of the Commission on the topic, and including in the agenda of its next regular session an item entitled "Responsibility of States for internationally wrongful acts". He proposed, in addition, that the Assembly should request States to submit written comments on the draft articles for consideration at the fifty-seventh session.

32. **Mr. Lindenmann** (Observer for Switzerland) expressed support for the Commission's recommendation that for the time being, the General Assembly should merely "take note" of the draft article, the possibility of convening an international conference of plenipotentiaries being left for a later stage. The draft articles were carefully balanced, and the consistency and unity of the text could be disrupted by negotiations if such a conference was called immediately. In the meantime, the draft articles and the commentaries thereto would certainly provide guidance for State practice. In the longer term, however, a legally binding instrument would be preferable, and once achieved would form a pillar of international law.

33. Turning to the issues in the draft articles on which his delegation still had some doubts, he said that the question of State responsibility for the acts of another State had not yet been satisfactorily resolved. Article 18, dealing with coercion of another State, failed to take account of the international obligations of the coercing State. As a result, a State subject to an international obligation could escape it by coercing another State not subject to the same obligation to commit an internationally wrongful act on its behalf. In any case, international law should help to prevent States from exercising coercion on one another.

34. He welcomed the inclusion, in the new chapter III of Part Two of the concept of peremptory norms of general international law which was already familiar from article 53 of the Vienna Convention on the Law of Treaties, and which emphasized the normative or binding character of the rules in question. The new chapter was itself a welcome feature. Article 41, paragraph 11, did not define the form or extent of the

duty of States to cooperate, except insofar as their cooperation must be "through lawful means". However, the scope of their duty in that sense was relative both to the means they possessed and to the circumstances of the case. That idea could be expressed by qualifying the means as "appropriate", "reasonable" or "adequate". Of course, in the exceptional circumstances contemplated in article 40, States must endeavour to cooperate as fully as possible.

35. The inclusion of provisions on countermeasures in Part Three, chapter II, did nothing to reduce the existing inequality among States. That inequality sprang from an imbalance in their power relationships which would persist as long as there was no international authority to monitor the invocation and application of the provisions on countermeasures. However, Switzerland favoured the inclusion of the articles on countermeasures, if only because it was better to regulate them than to ignore the issue altogether. The reference to proportionality in article 51 represented a considerable gain. However, the provisions on countermeasures should not feature in the same chapter as those governing invocation of the responsibility of a State. The structure of the draft should reflect more clearly the subsidiary character of countermeasures. As matters stood, one had the impression that they were one of the two kinds of consequences which followed from international responsibility.

36. Concerning the absence of any provision for dispute settlement, he pointed out that since the draft was concerned only with secondary rules, and States involved in a dispute concerning a question of international responsibility would need to resolve the dispute as a whole, it was not strictly necessary to include any provision concerning a dispute settlement mechanism. He therefore agreed with the Commission's decision to dispense with such provisions at the current stage, although a future international convention must in principle include them.

37. **Mr. Hinestrosa** (Colombia) recalled that the Secretary-General, in his report on the work of the Organization (A/56/1, para. 9) had said that the quest of the United Nations to build a world of order and justice could be achieved only through respect for the rule of law in international affairs. The work of the Commission had done much to build security and confidence in international relations, and adoption by the General Assembly of the two sets of draft articles recently completed by the Commission would again show the determination of the international community to conduct itself within the framework of international legal norms.

38. The draft articles on State responsibility, once adopted in the form of a legally binding convention, would form a bulwark of the international legal system, alongside the Vienna Convention on the Law of Treaties and the law relating to the peaceful settlement of disputes. The draft embodied State practice and also contained elements of progressive development. Its structure clearly reflected the separate elements of State responsibility and their interaction, as well as the difference between the consequences of an internationally wrongful act and the means available to deal with it.

39. It would have been preferable to include general guidelines for the conduct of States with regard to the settlement of disputes. Such a move would not have undermined the principle of free choice established in Article 33 of the Charter, or weakened special rules on the subject.

40. The serious reservations his delegation had expressed the previous year about the application of countermeasures were even more valid, since the section relating to dispute settlement had been deleted from the final text of the draft articles. Resort to countermeasures was not a right under international law, but a barely tolerated practice in exceptional cases covered by partially developed customary law. The Commission had progressively developed international law regarding an institution based on failure to honour an international obligation by a State which considered that its interests had been affected and was trying to obtain reparation. Hence an attempt was being made, through the progressive development of international law, to legitimize a practice which would alter the security system resting on the Charter of the United Nations and would be superposed on it in the event of collective countermeasures. Even though the draft articles laid down stringent criteria for the use of countermeasures, States' margin of discretion in that respect was much too wide and upset the requisite balance of the articles. Countermeasures were not a logical, automatic consequence of State responsibility and therefore had no place in the law on the responsibility of States.

41. Although Colombia would prefer the draft articles ultimately to take the form of a legally binding convention, because that would guarantee full compliance with the institutions they established, it realized that many obstacles still impeded the achievement of that goal and therefore supported the recommendations made by the Commission in paragraphs 72 and 73 of its report.

42. Turning to chapter V of the report, he said that, with regard to the fulfilment of the obligation of due diligence, which governed the principle of prevention, special consideration should be paid to the socio-economic development of the parties, the scientific and technological facilities available and the practical realities of the context in which activities liable to cause transboundary harm were carried out.

43. Some provisions of the draft articles should be strengthened with a view to establishing clearly the relationship between the effective application of the principles of prevention and due diligence on the one hand and, on the other, conditions in the developing world, international financing mechanisms and the need to promote technology transfers to, and capacity-building in, the developing countries. It was essential to bear those aspects in mind when formulating rules and putting them into practice.

44. There was no need to hurry to adopt an international convention based on the draft articles; States were already under an obligation to adopt specific measures to regulate harmful activities. It therefore seemed more appropriate first to adopt the draft articles as a set of criteria or guidelines which could serve as the foundation of more detailed regional or bilateral agreements between interested parties. The draft articles would be a good starting point for future work in the field of environmental law.

45. It was to be hoped that States would display enough political will to take decisions concerning the final form of the two sets of draft articles that would not disappoint the members of the Commission, who strove to provide a legal framework for international relations while taking account of practical realities.

46. **Mr. Hafrad** (Algeria) said that the codification of State responsibility was vital to harmonious international relations, because it offered an alternative to the use of force as a means of settling disputes between States and constituted the best guarantee for the maintenance of international peace and security.

47. In the past, his delegation had feared that inclusion of countermeasures in the draft articles mi offer certain States justification for taking unilate action to restore the status quo ante on the grounds t it had been altered by a wrongful act. That pract which was followed by some very powerful Sta should not become universal and could be codified a rule of international law only subject to the stric precautions. For that reason, the codification of a le regime of countermeasures which did not take account the de facto inequality between States wo merely give the legal seal of approval to a hig questionable practice and might even t countermeasures into a legitimate means of coerc individually exercised by certain Powers.

48. While it was difficult to challenge the existe in customary international law of a rule wh authorized a State to breach a legal obligation t State which had committed a wrongful act towards very close attention must be paid to the conditi relating to resort to countermeasures. Article 50 therefore most welcome, since it listed a number countermeasures which were prohibited. Obviously State taking countermeasures had to respect ot procedural obligations set forth in paragraph 2 of article. The fact that all countermeasures in breach those obligations were banned under that article therefore grounds for satisfaction.

49. He was pleased to note that resort countermeasures was subject to the conditions down in article 52 and that, even though article established the principle that countermeasures w lawful, it limited their scope. Proportionality, principle clearly affirmed in article 51, must refer c to the level of measures required to secure respect the obligations of the State responsible for wrongful act.

50. On the whole, the articles on countermeasu seemed well-balanced and Algeria generally suppo them. The aim of countermeasures could only be cessation of the wrongful act, the restoration international law and reparation for the injury cau without jeopardizing international peace and securit

51. Turning to chapter VII of the report, he said diplomatic protection was usually the way in which international responsibility of States was implemen but history had shown that the exercise of s protection had been largely subject to consideration

political advisability. Although it was a deeply rooted traditional principle that a Government could exercise diplomatic protection only on behalf of its own nationals, there were still wide divergences of opinion as to the basis and scope of the rule. The requirement that a link of personal dependence should exist between the claimant State and the injured individual was still to some extent justified by the notion that an injury to an individual was an offence against the State of which that person was a national. Nevertheless, when exercising diplomatic protection, a State had no justification whatsoever for resorting to the threat or use of armed force, save in a case of self-defence, as provided for in Article 51 of the Charter of the United Nations. Such an eventuality could be contemplated only in response to armed aggression, but not in the context of diplomatic protection.

52. When drafting article 9, the Commission had had to choose between several existing rules, rather than creating new ones. Since the classic theory of diplomatic protection, where the State gave diplomatic protection to a national when it was injured in the person of that national by the wrongful act of another State, was a crucial principle on which any effort to codify the subject material should rest, the general trend in international law to protect persons did not warrant any change in the rule of the continuity of nationality, although it could be made more flexible through the introduction of some exceptions in the event of a change in nationality due to State succession, marriage or adoption.

53. With regard to article 10, paragraph 2, his delegation supported the Special Rapporteur's view that non-legal or discretionary remedies should be excluded from the ambit of the local remedies rule.

54. **Ms. Todorova** (Bulgaria) observed that in drawing up the draft articles on the responsibility of States for internationally wrongful acts the Commission had wisely focused on the secondary rules of responsibility rather than endeavouring to define the content of international obligations. Modern notions of international law had been incorporated in the text and, for that reason, the draft articles and the commentary thereto would certainly constitute a major contribution to the progressive development and implementation of international law.

55. The draft rules did, however, require more detailed analysis by Governments in order to determine, for example, the precise content of the notion of serious breaches and the subjects of law forming the international community as a whole. There were also questions surrounding the probable legal connection between serious breaches of obligations flowing from the peremptory norms of general international law and the entitlement of the international community as a whole to invoke State responsibility. Bulgaria therefore considered that the action recommended by the Commission in paragraphs 72 and 73 of its report was appropriate.

56. With regard to chapter V of the report, her Government had consistently maintained that prevention offered the strongest basis for environmental protection and sustainable development, and it was therefore in favour of the draft articles on international liability, which reflected the principle that prevention was an obligation and provided for procedures to deal with the harmful consequences of activities not prohibited by international law. The best features of the articles were the provisions on due diligence and on the obligation to cooperate in good faith, as well as the attempt to strike a balance between interests. Similarly the commentary was apposite and useful. She was pleased that the observations made by her delegation in the Sixth Committee had been taken into account by the Commission. Bulgaria therefore supported the draft articles and the Commission's recommendation that a convention should be elaborated on basis of the articles.

57. **Mr. Setiabudhi** (Indonesia), referring to chapter IV of the report, said that he agreed with the Commission's decision to change the title of the topic to "responsibility of States for internationally wrongful acts", so as to distinguish from the responsibility of the State under internal law. The new provision on peremptory norms in Part Two, chapter III, was useful, as the notion of peremptory norms stemmed from the Vienna Convention on the Law of Treaties. His delegation therefore believed that the provision in question referred only to serious breaches of peremptory norms and excluded minor infringements of them.

58. If the chapter on countermeasures were to be retained, it should be amended so as to avoid the possibility of more powerful countries coercing weaker ones. On the other hand, it had been wise to drop the provisions on dispute settlement, since that was a matter which could be decided later.

59. His delegation was in favour of convening an international conference of plenipotentiaries to examine the articles with a view to concluding a convention.

60. **Mr. Crawford** (Special Rapporteur on responsibility of States for internationally wrongful acts), replying to questions raised during the debate, said that it was satisfying to note the high level of support in the Committee for the final text of the draft articles on State responsibility. In particular, he was pleased that the balance struck, with regard to the highly controversial subject of countermeasures had met with general approval, including that of some Governments which had been critical of the articles on countermeasures in previous years. There was also a high level of agreement on the removal from the text of any punitive elements of State responsibility.

61. He wished to address three issues raised by delegations in order to avoid any misunderstandings in the further consideration of the text.

62. First, with regard to the relationship between articles 41 and 48, the distinction drawn by the Commission between peremptory norms, or substantive obligations, and the provisions in respect of invocation in the collective interest already existed in the jurisprudence and literature. While it might have been preferable for the International Court of Justice to have used the formula "peremptory norms" in 1970 and to have developed the invocation aspects of the issue in that framework, the Court had not done so; it had instead used the phrase "obligations *erga omnes*" or "obligations to the international community as a whole" on a number of occasions since then. It had seemed to the Commission that the best approach was to treat the question of peremptory norms as governing issues relating to obligations between States, and questions of obligations *erga omnes* as being concerned with invocation — precisely the context in which those obligations had been at stake in the *Barcelona Traction* case and elsewhere. Thus, the distinction seemed appropriate in the light of the existing development of international law.

63. The second point concerned the limitation of articles 40 and 41 to the most serious breaches. While it was true that any breach of a peremptory obligation was serious by definition, some peremptory obligations covered a wide spectrum of possibilities. That was obviously not true for genocide; there was no such thing as a trivial genocide. The same might be sa crimes against humanity. War crimes, however, serious, might not be at the level of seriousness brought Part Two, chapter III, into operation. An example might be an isolated act of torture comm by a junior state official contrary to orders. The that the State itself should be subject to a re having strict consequences in respect of isolated ac that nature seemed undesirable, and most delega had approved of the Commission's choice in the m

64. Third, with regard to article 54, the Commi had listened carefully to all the comments r particularly the strong criticism of the article i previous year, and had decided to leave the m open. Article 54 did not use the "countermeasures"; it used the term "lawful measu The matter would be subject to the developme general international law, there being no intentio the Commission's part to favour one view or the o

65. The Committee currently faced only one iss its handling of the Commission's recommendati was obvious that the draft articles and commentaries would require further study Governments before they could be endorsed manner implying commitment. The question whether the Committee wished to reopen a substa debate on the draft articles on an article-by-a basis. The difficulty was that reopening debate o one of the articles would lead to re-examination entire text, which would be a lengthy process. the members of the Commission were divided whether the draft articles should take the form convention, they felt strongly that the right mov simply to annex the text to a draft resolution commend it to Governments for their considerati the proper time. He too endorsed that approach.

66. **The Chairman** expressed appreciation to Special Rapporteur for his valuable contribution t successful completion of the draft articles on responsibility.

67. **Mr. Kabatsi** (Chairman of the International Commission), introducing chapter V of the report that the Commission had completed its second re and adopted the final text of the draft article prevention of transboundary harm from haza activities.

68. He drew attention to paragraph 94 of the r in which the Commission recommended to the G

Assembly the elaboration of a convention by the Assembly on the basis of the draft articles.

69. The Commission had made a slight change in the title of the topic in view of the fact that the draft articles spoke of transboundary "harm" and not of transboundary "damage". The title therefore read "Prevention of transboundary harm from hazardous activities". That change did not affect the French, Spanish or Russian versions of the title.

70. The Commission in principle did not include preambles to the texts that it prepared. Nevertheless, it was of the view that the inclusion of some principles in the preamble might better project the balance of interests test, which had been the underlying theme of the entire set of draft articles on the topic. The preamble referred to the principle of permanent sovereignty of States over their natural resources and to the countervailing principle that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control was not unlimited. Those principles were rooted in the Stockholm and Rio Declarations, which had been among the important documents guiding the Commission's work on the topic.

71. The text comprised 19 draft articles, beginning with article 1 on the scope. It spoke of "activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences". Some had favoured deleting the words "not prohibited by international law". Nevertheless, the Commission had retained that wording, which was intended to separate the topic from the topic of State responsibility, which dealt with wrongful activities and, as such, prohibited activities. It was the understanding of the Commission, however, that the lines separating activities which were not prohibited by international law and those which were prohibited were not always clearly visible and that the invocation of these articles should not per se bar a claim that an activity in question was a wrongful act.

72. Article 2 defined six terms commonly used in the draft. Some of the subparagraphs had much more substantive functions than simply defining a term; they set a threshold, clarifying the scope of the topic further. For example, subparagraph (a) defined the concept of "risk of causing significant transboundary harm". The intention in that definition was to refer to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It was therefore the combined effect of "risk" and "harm" which set the threshold.

73. Article 3 set out the general obligation of prevention on which the entire set of draft articles was based. The primary objective of the measures to be taken by States was the prevention of significant transboundary harm, while the minimization of risk would constitute a secondary option if the objective of prevention could not be attained. The commentary explained that the phrase "all appropriate measures" included the obligation of States parties to, inter alia, adopt national legislation incorporating accepted international standards. Those standards would constitute a necessary reference point to determine whether the measures adopted were suitable. Furthermore, it should be noted that article 3 was complementary to articles 9 and 10 and that they formed a harmonious whole. Article 4 dealt with cooperation among the States concerned. That principle constituted an essential part of designing and implementing effective policies to prevent transboundary harm or minimize the risk thereof.

74. Article 5 stated the obvious, namely, that once a State became a party to the draft articles, it would be required to take the necessary measures to implement them. The use of the term "other action" was intended to cover the variety of ways and means by which the States could implement the articles. Article 5 mentioned some measures expressly only in order to give guidance to States. The obligation of a State to take necessary measures could be limited to establishing the appropriate regulatory framework and applying it, thus precluding State involvement in operational issues relating to activities to which article 1 applied.

75. Article 6 set forth the fundamental principle that the prior authorization of a State was required for activities falling within the scope of the articles. The article made the requirement of prior authorization also applicable to pre-existing activities and to any major change to an activity already taking place.

76. Article 7 required prior assessment of the risk of an activity causing significant transboundary harm before authorization was granted. That requirement was consistent with contemporary trends in international law of requiring environmental impact assessment of any activity which might cause

significant environmental harm. In view of the novelty of that requirement, the words "in particular" had been added to highlight its importance. The question of who actually conducted the assessment and what its content ought to be was a matter left to the domestic laws of States.

77. Article 8 dealt with a situation in which the assessment undertaken in accordance with article 7 indicated that the activity planned did indeed pose a risk of causing significant transboundary harm. Article 8, together with articles 9 and 10, provided for a set of procedures essential to balancing the interests of all the States concerned by giving them a reasonable opportunity to find a way to undertake appropriate preventive measures. Article 8 followed the approach taken in other similar conventions.

78. Article 9 dealt with consultations on preventive measures. It required the States concerned to enter into consultations in order to agree on the measures to prevent significant transboundary harm, or at any event to minimize the risk thereof. Consultations might be held prior to authorization of an activity or during its performance.

79. The purpose of article 10 was to provide some guidance for States in their consultations to achieve an equitable balance of interests. In order to attain such an objective, all the relevant factors and circumstances should be taken into consideration. The article drew its inspiration from article 6 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

80. Article 11 addressed the situation in which a State, in the absence of notification, became aware that an activity planned or carried out in a State of origin carried a risk of causing significant transboundary harm. If the concerns of the State were based on reasonable grounds, it requested the State of origin to apply article 8.

81. Article 12 dealt with steps to be taken after an activity had begun, with the purpose of preventing significant transboundary harm or minimizing the risk thereof. The wording of the provision envisaged a possible continuation of the exchange of information even once the activity had ceased. That was a recognition of the fact that the consequences of certain activities continued to pose a significant risk of transboundary harm even after they were terminated.

82. Article 13, dealing with information to the publi was inspired by the new trend of seeking to involve a State's decision-making process individuals who lives, health, property and environment might affected, by providing them with a chance to prese their views and be heard by those responsible f making the ultimate decisions.

83. Article 14 provided a narrow exception to th obligation of States to provide information under oth articles. The exception covered information considere vital to national security or to the protection industrial secrets or intellectual property, altho igh th provision also called for good faith cooperation providing as much information as possible.

84. Article 15 was based on article 32 of th Convention on the Law of the Non-navigational Us of International Watercourses. It set out the bas principle that the State of origin was to grant access its judicial and other procedures without discriminati on the basis of nationality, residence or the place whe the harm occurred.

85. Article 16, dealing with emergency preparednes was based on article 28, paragraph 4, of the Conventi on the Law of the Non-navigational Uses International Watercourses. The article had bee included during the second reading of the topic. required the State of origin to develop contingen plans for responding to emergencies, in cooperatio where appropriate, with the State likely to be affect and competent international organizations.

86. Article 17 (Notification of an emergency) w also new and was based on article 28, paragraph 4, the Convention on the Law of the Non-navigation Uses of International Watercourses. It required th State of origin to notify the State likely to be affect as expeditiously as possible of emergencies concerni an activity together with all relevant and availab information.

87. Article 18 established the relationship betwe the rights and obligations of States under the dr articles and other international obligations, wheth treaty-based or based in customary international la The provisions stipulated that the articles were withc prejudice to any obligation incurred by States unc international law. It did not purport to resolve the iss of an overlap between the obligations under treat and customary international law and obligations unc the draft articles.

88. Lastly, article 19 provided a basic rule for the settlement of disputes arising from the interpretation or application of the regime of prevention set out in the draft articles. It was based on the provisions of article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

89. **Mr. Al Baharna** (Bahrain) said his delegation believed that the draft articles would ensure an equitable balance between the interests of the State of origin and those of the State likely to be affected.

90. The expression "significant transboundary harm", used in articles 1, 2 and 3, had been accepted as the most appropriate for the topic, and was used in the Convention on the Law of the Non-navigational Uses of International Watercourses. His delegation felt that the commentary to article 2 provided an acceptable explanation of the expression "risk of causing significant transboundary harm" which could alleviate the criticism of paragraph (a) of that article. The definition in paragraph (3) of the commentary to article 2 distinguished between a high probability of causing significant harm and a low probability of causing disastrous harm; that reasoning seemed logical.

91. Articles 1, 2, 3 and 4, which dealt with the core issues of the topic, were acceptable. The expressions "activities not prohibited by international law" and "significant transboundary harm" were used appropriately in article 1; the former expression provided the basis for the distinction of the topic of international liability from the topic of State responsibility, and there did not appear to be a better alternative to the latter expression.

92. In article 3, which complemented articles 9 and 10, the obligation to take "all appropriate measures" to prevent significant transboundary harm, or minimize the risk thereof, had been interpreted in a wider context, so that it would be equivalent to due diligence, thereby ending the controversy about that term.

93. Article 4 introduced the internationally accepted principle of cooperation in good faith between States concerned in order to prevent significant transboundary harm, or, at any event, to minimize the risk thereof.

94. His delegation supported articles 5 to 18, which were essentially procedural in nature, serving to implement the obligations undertaken in cooperation between the State of origin and the State likely to be affected. In particular, it welcomed the drafting improvements and modifications made by the Commission in respect of articles 6, 7, 9 and 10.

95. His delegation believed that the issue of international liability should be taken up as soon as possible. The Commission should draw on the abundant material which was available on that issue, both in State practice and jurisprudence and in international agreements, as well as the many useful ideas developed by the former Special Rapporteur, Mr. Barboza, in his reports on the topic. His delegation looked forward to the preparation by the Commission of an integrated text of a convention combining the two aspects of the topic, prevention and liability, in a single framework convention, under the current title.

96. Article 19, on the settlement of disputes, needed to be more comprehensive and exhaustive. Although it was based on article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses, it stopped short of providing for the arbitration and judicial procedures envisaged in that article. On the other hand, it had the advantage of incorporating the internationally recognized principle of good faith, in paragraph 6; his delegation felt that that paragraph should go further by providing for the option of submitting a dispute, by mutual agreement, to arbitration or judicial settlement, following non-implementation by the parties to the dispute of the findings and recommendations of the fact-finding commission.

97. **Ms. Xue** Hanqin (China) said that at a time when the ecology of the Earth and the natural environment were of increasing concern, all States had a responsibility to seek effective means of preventing transboundary harm from hazardous activities. A number of international environmental treaties had been concluded on specific topics, so that a preliminary international legal regime for the protection of the environment had been put in place. However, many areas were not covered by applicable laws, and much work remained to be done by the international community. The draft articles represented a very useful attempt to fill existing gaps, and were the first articles ever to deal with the prevention of transboundary harm by means of general rules of international law. Her delegation believed that the implementation of the measures set forth in the draft articles would contribute to the prevention and minimization of transboundary harm from hazardous activities and would serve as a practical guide for the elaboration of international legal

instruments dealing with specific topics of environmental protection.

98. As the largest developing country, China had always been very concerned about the prevention of transboundary harm from hazardous activities; it stood ready to work with all other countries in the establishment of an international legal regime in the area of environmental protection.

99. **Mr. Lammers** (Netherlands) said that the completion of the draft articles had been made possible by the Commission's decision in 1992 to divide the work into two stages: prevention and liability, and, in 1998, to separate those distinct, though related issues. However, his delegation felt that it would be premature for the draft articles to be taken up at the diplomatic level in the form of a convention; before taking that step, the Commission must complete its work on liability, or at least make significant headway.

100. Although many multilateral environmental agreements were concerned with prevention and provided for the elaboration of liability rules at a later stage, it should be noted that that separation had not been very successful: many such agreements had not entered into force or had not attracted wide participation. His delegation was therefore in favour of developing a convention that covered both prevention and liability as a package.

101. His delegation believed that the General Assembly should take note of the draft articles, which broadly reflected customary international law and, as such, were applicable to States; urge the Commission to continue work on the topic and complete it as soon as possible; and refer to the future transposition of the draft articles into a convention, taking into account the Commission's further work on the topic.

102. Article 15 could be a useful starting point for further work on part two of the topic. His delegation suggested that the Commission should develop procedural standards on access to justice and substantive standards on liability and redress for harm suffered. Such standards would ensure that domestic and foreign victims could avail themselves of effective legal remedies and would generally obtain redress for any losses incurred. The provision of adequate means for obtaining appropriate compensation, especially for those who sustained transboundary, injurious consequences of activities without reaping their benefits, was a matter of elementary justice to which the Commission could make an important contribution.

The meeting rose at 1.05 p.m.